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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-894

UNITED STATES STEEL CORPORATION,
Petitioner

versus

SHIRLEY ROBERTS LAIRD, Individually and for and on behalf of the minors MICHAEL GRAY LAIRD and JOHNNY MARK LAIRD,
and
HUDSON ENGINEERING CORPORATION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Now comes United States Steel Corporation, petitioner, hereinafter referred to as USS, and respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 29, 1971, affirming by a two to one vote with a strong eighteen-page dissent by Judge O'Sullivan of the Sixth Circuit sitting by designation, a judgment of the District Court predicated on a jury verdict in the total sum of $415,287.85. A timely petition for a rehearing filed on October 7, 1971 was denied on October 28, 1971. A request in the Court of Appeal for a stay order

against the mandate filed in the Court of Appeal on October 29, 1971, was denied on November 10, 1971. An application for a stay before this Honorable Court was granted on November 16, 1971 by Justice Potter Stewart, Appendix I.

OPINION BELOW

The opinion in question of the Court of Appeals is reported at 449 F.2d 216, and carried herein as Appendix A, and the letter from the clerk of that Court as to the order denying a rehearing, as Appendix D.

The trial court, the United States District Court for the Eastern District of Louisiana, New Orleans Division, rendered its judgment, on July 10, 1970, as is carried herein as Appendix E, and the stay order by Justice Potter Stewart, Appendix I.

JURISDICTION

The judgment of the Court of Appeals was entered on September 29, 1971, Appendix B, in this diversity proceeding. A petition for rehearing was timely filed by this petitioner and was denied on October 29, 1971.

The jurisdiction of this Court is invoked under 28 US Code 1254(1). The jurisdiction of the District Court was invoked under 28 U.S. Code 1332.

QUESTIONS PRESENTED

I. Whether the District Judge erred in failing to charge the jury as to the effect of income taxes against

the award and also against loss of earnings, which inflated the award and constituted reversible error.

II. Whether the District Judge failed to instruct the jury that the unexplained failure to produce its knowledgable vice president and project engineer, Battershell, who knew all about this construction by Hudson, created a presumption that had he been produced as a witness his testimony would have been adverse to the interests of the Hudson Engineering Company, the third-party defendant, which was reversible error.

III. Whether the District Court discriminated against USS by allowing a witness unlisted until just prior to the trial, Darnielle, to testify for Hudson and in refusing to allow USS's listed expert witness, Holmberg, to testify, which was reversible error.

IV. Whether in light of the Seventh Amendment the District Court erred in allowing interest in an ex delicto matter before a jury which was not allowed in 1791 and which was reversible error.

V. Whether the District Court erred in refusing to admit into evidence Shell's complete report instead of limiting the offer to the photographs thereto annexed, which was reversible error.

STATUTES INVOLVED

On the subject of interest involved is the validity of 28 US Code 1961 and Louisiana Revised Statutes 13:4203, which State statute allows interest from the date of judicial demand on all judgment sounding in damages ex delicto.

STATEMENT OF THE CASE

The majority of the Court of Appeals panel of three judges in a per curiam of less than two pages affirmed without stating the salient facts. The dissenting opinion of Judge O'Sullivan is the only one which sets forth the salient facts. We submit the following facts verbatim from page 3 of that opinion:

> "O'SULLIVAN, Senior U. S. Circuit Judge, dissenting:
>
> "I respectfully dissent. I do so because the size of the recovery impelled me to consider whether the trial procedures visited any unfairness upon appellant United States Steel. As set out hereinafter, I am persuaded that such did occur.
>
> "Because the majority opinion is silent as to the facts which brought about this lawsuit, I recite those necessary to an exposition of my own views. The amount of $238,000, the figure mentioned in the majority opinion, was awarded for loss of support. Additional amounts allowed for decedent's pain and suffering, for loss of companionship, and for some miscellaneous expenses brought the total recovery to $415,287.85.
>
> "Plaintiff's decedent, Malcolm Gray Laird, then 37 years of age, receved fatal burns when an explosion occurred in a pipeline located at the premises of Shell Oil Company near Gibson, Louisiana. The catastrophe occurred on December 17, 1968. Malcolm Laird died on December 28, following. He suffered very great pain during the days that intervened. On the date of the explosion, the deceased, a night shift foreman in the employ of Shell, was earning $800 per month.

He was survived by his widow and two minor children, Michael Gray Laird and Johnny Mark Laird, aged 13 and 9, respectively.

"This lawsuit was started in the United States District Court for the Eastern District of Louisiana on March 6, 1969, naming as defendants United Gas Industries, Inc., United Pipeline Company and Pennzoil United, Inc. The case against these defendants was dismissed when it was disclosed that they had nothing to do with the installation or operation of the pipeline. On May 2, 1969, an amended complaint was filed naming Hudson Engineering Corporation as defendant and charging it with negligence in the design, construction and fabrication of the gas transmission line and its connection with a gas transmission line owned by Shell Oil Company leading into the latter's plant. The explosion occurred at the place of this connection, and it was established that such connection had been made by Hudson Engineering under contract with Shell Oil Company some four or five years before the explosion. The appellant United States Steel was not named or accused of any wrongdoing in the first amended complaint filed some five months after the fatal accident.

"On August 26, 1969, another amended complaint was filed—this time adding the United States Steel as a defendant, charging that Steel had manufactured and furnished the 30" pipe that made up the main gas line that led to the 'connection.' This complaint then charged that U. S. Steel *and* Hudson were negligent because of 'improper and faulty design, construction, fabrication and manufacture' of the main pipeline and the 'connection.' Thereafter, Hudson filed a cross-claim against U. S. Steel, its allega-

tions casting the entire blame for the accident upon Steel.

"The stage for this disaster was set in 1964 when, pursuant to a contract with Shell Oil, Hudson Engineering constructed a gas processing plant at the site in question. Supplemental to this original contract, Hudson agreed to extend a 30" gas line to the plant at a depth of five feet below the ground from a flange on a previously installed 30" gas transmission line coming in from the Gulf Tidelands. Another gas transmission line, 12 3/4" in diameter and owned by Shell, would intersect with the 30" line at a point some distance from the plant. The 12" line approached the 30" in a perpendicular direction, three feet above the ground, with a valve several feet from the 30". Hudson connected the 12" into the 30" by using a 'Weldolet,' a device which required cutting a hole in the 30" pipe and welding this Weldolet to the two lines. Except for the explosion on December 17, 1968, there was no evidence of any difficulty with the performance of the 30' pipe which had been furnished by U. S. Steel. It continues in use at the Shell Oil plant.

"The case came on for trial to a jury on June 8, 1970, Hudson charging that the inferior quality of the 30" pipe which had been furnished by Steel was the sole cause of the explosion, and Steel charging that carelessness of Hudson in designing and making the connection was the cause of it. Resolution of the issue of proximate and responsible fault became primarily a contest of experts hired by the antagonists, although Steel produced some of its own people. Hudson produced none of its people who had designed and carried on the work of making the involved connection. Its vice-president, one

Battershell, who had been Hudson's project engineer on the job—listed in a pretrial order as a witness it would produce at trial—had gone to Australia at the time of trial and Hudson was allowed to provide a substitute for him. The witness, however, was not called by Hudson but by plaintiffs, whose counsel enjoyed the advantgage of cross-examining him as an adverse witness. As discussed later, Steel charges error in this allowed change of witnesses. None of the persons listed at pretrial as those employees of Hudson who had made the installation where the explosion occurred was produced. Shell Oil Company was allowed to intervene as a party plaintiff to seek recovery for the cost of fulfilling its Workmen's Compensation obigations to the widow of the decedent. It charged that the death of its employee resulted from negligence of Hudson Engineering and U. S. Steel. The evidence showed that promptly after the explosion, with the consequent death of its employee and damage to its plant, Shell began an investigation of the scene of the explosion. It used men from its engineering staff, some of whom qualified as experts in the relevant field. The investigating team totalled some six men. They made a written report of their findings which was ambivalent as to fixing the blame for the casualty. This staff-written report contained the following conclusions:

"'Preliminary conclusions based on visual inspection of the ruptured pipe are that the rupture originated from a brittle crack in the base metal of the 30-inch pipe at the toe of the weld attaching the 30 x 12 Weld-O-Let to the pipe. It appears that the brittle crack was formed some time prior to the failure and resulted from residual stresses develveloped during the fabrication or from the

combination of these residual stresses and subsequent mechanical damage. It is further concluded that damage to the existing plant would have been lessened by different design of certain plant components.'

It will be noted that this conclusion did not fix the total blame upon the U. S. Steel pipe, nor forecast the opinions that would be expressed by the experts hired by plaintiffs and Hudson.

"None of these Shell investigators, however, was produced by the plaintiffs, by Shell, or by Hudson. The defendant called some of these men, but was denied the opportunity to cross-examine them or use the above report in such examination — this notwithstanding that their employer, Shell Oil, had become a party adverse to U. S. Steel. Their trial testimony can be read as, in some measure, downgrading their first expressed views as being mly 'preliminary' Hudson Engineering was not employed to make the repairs required by the explosion.

"At trial, plaintiffs Hudson Engineering and Shell Oil were aligned in casting blame on Steel. Plaintiffs called as a witness for cross-examination Hudson's named expert who found agreement with plaintiffs' expert in assigning the cause of the explosion to inferior quality of the pipe furnished by Steel. Plaintiffs' proofs were so acceptable to Hudson and Shell that the latter rested their cases at the close of plaintiffs' proofs. By direction of a pretrial order, the jury was required first to determine liability. It exonerated Hudson. It was then directed to assess plaintiffs' damages against U. S. Steel only.

"The judgment entered, $415,287.85, comprised the jury's award to the widow and minor

children of plaintiffs' decedent of $238,000 for loss of support, $100,000 for pain and suffering of the deceased during the eleven days that he survived his fatal burns, $70,000 for loss of companionship of the deceased husband and father, and $7,287.85 for medical and funeral expenses. To the figure of $415,287.85 there was added interest at 5% from August 26, 1969, the date when appellant United States Steel was added as a party defendant to the suit. If we may assume that it will take to August 26, 1971, to bring this matter to finality, there will be added to the judgment $41,528.78 for interest, making a total amount to satisfy the judgment of $456,816.63. The deceased's earnings at the time of death were $9,600 per year. If the amount to be paid in satisfaction of the judgment were invested at a yield of 5% per annum, such investment would yield a yearly income of approximately $23,000 for the remaining life of the plaintiff widow, or for whatever period the sum remained invested, and at the end of such period the entire principal sum would still be intact."

The foregoing statement of facts is not at issue. This petition concerns the said five legal questions.

It is the position of petitioner that the judgment of the Court of Appeals is erroneous in the respects above set forth, some of which points contradict the holdings of this Honorable Court; as we shall demonstrate.

ARGUMENT

I. THE DISTRICT JUDGE ERRED IN FAILING TO CHARGE THE JURY AS TO THE EFFECT OF INCOME TAXES AGAINST THE AWARD AND ALSO AGAINST LOSS OF EARNINGS.

For the District Court actually to recognize that if Laird had lived his normal income would have been subject to income taxes, but that with his death the sum awarded for loss of earnings should be determined without the consideration of the impact of income taxes, is inconsistent with reported circuit court decisions. Further, the jury was obviously confused on the question of whether part of the award was being taken by income taxes.

The District Court was requested by counsel for US Steel to charge the jury that the effect of income taxes should be considered in arriving at such an award but the District Court instructed the jury to the contrary.

Judge O'Sullivan's reasoning on this issue follows at p. 10:

> "Just before the jury was to retire, the following colloquy occurred:
>
> "'By Mrs. Gabb [a juror]: May I ask a question? You just said that we should not consider attorneys' fees or costs of court or interest. What about Federal tax on this amount awarded here? Is that taxable?
>
> "'By the Court: You are not to consider this. You will make your determination but without regard to *the tax* on the amount that you may award. (Emphasis supplied.)
>
> "'By Mr. Sarpy: But there is the income tax on the earnings.
>
> "'By the Court: Well, the income tax that Mr. Sarpy referred to was the tax on the possible earnings of Mr. Laird, and the

contention that taxes would be withheld on his earnings would affect the amount that would be available for his own support, as well as for the support that he would contribute, or might be expected to contribute, to his wife and children.

"'By Mr. Sarpy: Judge, I think the question of tax on the award itself, the Court mentioned that there would be no tax on that.

"'By the Court: I did not mention that at all. I said the jury was not to consider that.

"'By Mr. Sarpy: Not to consider it?

"'By the Court: Whether there was or was not.'"

"I am aware that this Circuit has held that the trial judge is not required to tell the jury that an award of damages in a death or personal injury case is not subject to income tax. *Cunningham v. Bay Drilling Co.*, 421 F.2d 1398 (5th Cir. 1970); *Prudential Ins. Co. v. Wilkerson*, 327 F.2d 997 (5th Cir. 1964). Such also is the rule in the Sixth Circuit case, *Payne v. Baltimore & Ohio R.R.*, 309 F.2d 546, 550 (6th Cir. 1962), *cert. denied*, 374 U.S. 847. The writer dissented on this point, saying:

"'Our contemporary public mind is well conditioned to the belief that, today, there is almost nothing of money value which anyone receives that is not shared in substantial degree with the national government. As pointed out by Chief Judge Lumbard in his dissent in McWeeney v. N.Y.N.H. & H.R. Co., 282 F.2d 34, 41 (C.A. 2, 1960), the public today reads of the rather spectacular share that the government takes of large sums "won on television quiz pro-

grams or in lotteries and sweepstakes." The public is informed of the amount that is taken in income taxes from large salaries paid to business executives, stars of the entertainment world and other large earners, and the amounts that are taken in taxes from decedents' estates. Have we any assurance that today's juries, awarding verdicts in the range of the one before us, $136,267.23, are aware that, unlike almost any other receipt of money, they are tax free? I would venture a guess that a substantial number of lawyers (excluding those engaged in the personal injury business) would be unsure of the tax consequences of receiving a $100,000.00 personal injury verdict. Should we expect jurors to be better informed?' " 309 F.2d at 552-53.

I am satisfied that soon the involved rule will be changed to require some recognition of the patent unfairness of refusing any help to juries who will be unsure of their own responsibilities in arriving at verdicts. See *Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245 (3rd Cir. 1971), 39 U.S.L. Week 2659, and also Chief Judge Lumbard's dissent in *McWeeney v. New York, N.H. & H.R.R*, 282 F.2d 34, 41 (2d Cir. 1960); and my dissent in *Payne v. Baltimore & Ohio R.R., supra*, 309 F.2d 546, 550 (6th Cir. 1962).

"What happened in the case at bar provides, in my view, sound reason for not applying the rule of the cases which merely refused to find reversible error in denying a request upon the point. In this case, defendants' counsel had, in his argument, said to the jury that the calculation of deceased's earnings had he lived had not taken into account the income taxes that would have had to be paid, and then told the

jury, 'any amount that you give him will be free from income taxes.' Quite obviously, counsel's statement did not satisfy all the jury on the point. I have set out above what the judge told the jury upon inquiry by one of them. At this distance, it would be quite difficult to be sure whether or not the judge's twice mentioning the subject:

> "'You will make determination but without regard *to the tax on the amount* that you may award.'"

and,

> "'I did not mention that at all. I said the jury was not to consider that.'"

was not, in effect, telling the jury that defendants counsel had misinformed them when he said that their award would not be subject to tax. Out of all of this, I feel that this jury could indeed have the impression, or at least be unsure, but that plaintiff would have to pay income tax on whatever verdict they gave. I observe that just before the quoted colloquy about income tax, the judge had said to the jury:

> "'In further considering the amount Malcolm Laird might have earned or the amount he would have contributed to the support of his surviving wife and children, you may consider the probabilities of inflation, depression, or a stable economy. In so doing, you may consider such things as increases and decreases in the cost of living and the wage-price ratio as your own common knowledge and experience may dictate.
>
> "'Similarly, in awarding damages, if any, you may consider *the decreased purchasing power of the dollar*.'" (Emphasis supplied.)

"Having been told these things, clearly calculated to enhance their award of damages, can it be considered fair to have left them with the impression or the passive fear that a large amount of their verdict would be taken for income tax?

"Why should we not have the sophistication and courage to baldly recognize that no such verdict would likely have been entered here except for the circumstance that the United States Steel Corporation is the defendant? In a day of much talk about equal protection of the law, should not the courts carefully consider whether a particular verdict came about from the apparent ability of the involved defendant to pay, rather than from a fair measuring of liability and damages?

"My brothers, however, do not consider the verdict excessive. Its size, however, and my impressions of some of the trial procedures set out above and hereinafter, urge me to consider whether trial errors contributory to the size of the verdict call for a new trial. See *Home Ins. Co. v. Tydal Co.*, 152 F.2d 309, 311 (5th Cir. 1945); *Sinclair Refining Co. v. Tompkins*, 117 F.2d 596, 597 (5th Cir. 1941)."

It is to be observed that as Judge O'Sullivan, points out, the decision by the Fifth Circuit in this case clashes with the reasoning in the Third Circuit's decision in *Domeracki vs Humble Oil & Refining Company*, 443 F.2d 1245 (CCA-3, March 18, 1971), and therefore squarely presents to this Court a matter which, according to Supreme Court Rule 19, Sec. 1-b, should be determined by this Honorable Court on certiorari because of the conflict with the decisions of another Court of Appeals. In *Domeracki* which is cited in II Harper and James, The Law of Torts ¶ 25.12, the Third Circuit stated:

> "Given the absence of complications that an instruction would engender, the tax consciousness of the American public, and the general lack of knowledge about the statutory exclusion, we hold that in personal injuries actions the trial courts in this Circuit must, in the future, upon request by counsel, instruct the jury that any award will not be subject to federal income taxes and that the jury should not, therefore, add or subtract taxes in fixing the amount of any award.
>
> "We decline, however, to reverse the judgment of the court below. Two important considerations influence this determination. First, the purpose of the rule which we promulgate for prospective application in this Circuit is to remove the possibility that juries will increase awards based on mistaken considerations of tax consequences. In the case at bar, however, there is no evidence that the jury was in fact so motivated, and because of the settled rule, heretofore discussed, that the sanctity of jury deliberations may not be invaded subsequent to the rendition of the verdict, any inquiry is now foreclosed."

In the case at bar the jury was bereft of the benefit of instructions concerning the impact of income taxes, and Judge O'Sullivan found that the jury had been motivated in this regard. This adds up to reversible error.

On this point alone the defendant is entitled to reversal and a new trial.

We further submit that the exorbitant award runs afoul of a previous decision by the Fifth Circuit in

Jenkins vs Aquatic Contractors & Engineers, et al., No. 30929, 446 F.2d 520, decided July 19, 1971 by a different panel composed of Judges Brown, Gewin and Morgan, which panel in remanding for reconsideration of damages found excessive, declared, at p. 522:

> "As for the problem of allegedly excessive damages, however, a consideration of the whole record persuades us that the District Court apparently misapprehended its responsibility with respect to the substantially based claim that the jury's verdict constituted unwarranted extravagance. The Judge in the face of such a claim may, and often must, consider one or both of two courses. First, even though the verdict has a sufficient Seventh Amendment basis to preclude a directed verdict or post-trial judgment n.o.v., F.R. Civ. P. 50, the Judge has wide discretion in granting a new trial (in whole or in part). *Marsh v. Illinois Cent. R. Co.*, 5 Cir., 1949, 175 F.2d 498; *Whiteman v. Pitrie*, 5 Cir., 1955, 220 F.2d 914. Second, he may, and often must, consider whether remittitur is required or permissible. See *United States v. 1160.96 Acres of Land*, 5 Cir., 1970, 432 F.2d 910."

Like treatment should have been given this case.

The point at issue we submit has far reaching consequences in personal injury litigation. It is a matter of paramount importance to defendants which the Supreme Court should settle so as to leave no room for speculation on the point by juries which do not have the benefit of a charge, as is the case here.

II. THE DISTRICT JUDGE FAILED TO INSTRUCT THE JURY THAT UNEXPLAINED FAILURE TO

PRODUCE ITS KNOWLEDGEABLE VICE PRESIDENT WHO KNEW ALL ABOUT THE CONSTRUCTION BY HUDSON, CREATED A PRESUMPTION THAT HAD HE BEEN PRODUCED HIS TESTIMONY WOULD HAVE BEEN ADVERSE TO THE INTERESTS OF THE HUDSON ENGINEERING COMPANY, THE THIRD-PARTY DEFENDANT, WHICH WAS REVERSIBLE ERROR

III. THE DISTRICT COURT DISCRIMINATED AGAINST USS BY ALLOWING AN UNLISTED WITNESS, DARNIELLE, TO TESTIFY FOR HUDSON AND REFUSING TO ALLOW USS'S LISTED EXPERT WITNESS, HOLMBERG, TO TESTIFY

These two points being visceral we deem it appropriate to treat them together.

It is difficult to conceive of a more flagrant violation of the rule that the only knowledgeable corporate official must be produced by such a corporation as a party to the suit, particularly in a matter involving, as this does, the construction by it of a pipeline. Hudson's Battershell was held out as such until withdrawn on the eve of the trial. The failure to produce Battershell creates the presumption that he would have testified adversely to Hudson.

In addition, permitting Hudson to produce a brand new witness, Darnielle, and at the same time refusing USS to produce in rebuttal an expert witness which it had listed 30 days previously militated heavily against USS.

In this regard Judge O'Sullivan declared at p. 15:

"I am of the view that the trial judge committed reversible error in refusing defendant's request to use an expert rebuttal witness because his name was not disclosed in the initial pretrial exchange of names of expert witnesses to be used at the trial. If denial of use of such rebuttal witness would ordinarily be an exercise of discretion by a trial judge, I would, in the total context of the trial involved, hold that the trial judge abused his discretion.

"In the majority opinion, my brothers dispose of the trial court's refusal to allow appellant to call a named rebuttal witness as follows:

"'U.S. Steel complains of the trial judge's refusal to relax his pre-trial order to allow an additional expert witness to testify for U. S. Steel *at the last minute*. This was clearly within the trial court's discretion and we see no abuse of discretion in his refusal *to relax the pre-trial order* in this instance. Moreover, it appears that the additional expert's testimony *would have been cumulative*.'" (Emphasis supplied.)

"With great respect, may I observe that appellant's request to call this rebuttal witness did not come *at the last minute*. Neither would it have been contrary to *the pretrial order* to have allowed this rebuttal witness to testify, and we have no way of knowing whether this witness' testimony *'would have been cumulative.'* The trial of the case had been set for June 8, 1970. On May 8, 1970, 30 days prior to the trial date, U. S. Steel's counsel filed a notice that one M. E. Holmberg might be called as an expert witness. Notice of this was given to all counsel of

record on the day it was filed. On June 3, 1970, plaintiff filed its opposition to appellant's calling such witness, averring that it would be unfair to allow U. S. Steel 'to surprise the other parties with a witness who has not been deposed * * *.' On June 3, 1970, the trial judge entered an order denying Steel the right to call the named witness, recognized as a rebuttal witness. The pretrial order of January 6, 1970, referred to above contained the following:

> "'In the event there are other witnesses to be called, at the trial, *at least ten (10) days prior*, the names, addresses and the general subject matter of their testimony will be reported to opposing counsel, and a supplemental note of evidence will be filed into the record of the case, but that *this restriction shall not apply to rebuttal witnesses*, the necessity of whose testimony cannot reasonably be anticipated befor the time of trial.'" (Emphasis supplied.)

"The plaintiff had ample time between May 8, 1970, and the fixed trial date in which to take a discovery of the witness that defendant proposed to call. It would appear, therefore, that U. S. Steel's notice of its intention to call M. E. Holmberg as a rebuttal witness was not *at the last minute* and the proposal to do so *was not at odds with the pretrial order*. It was given more than ten days prior to trial, and the relevant pretrial order specifically said that it 'did not apply to rebuttal witnesses.'

"Rule 16, Fed. R.Civ.P. covering pretrial procedure provides for a conference to consider 'The limitation of the number of expert witnesses.' The order before us did not attempt to set the number of experts to be used by either side. Al-

though this writer has heard that some District Judges, devotees of the asserted virtues of elaborate pretrial, require counsel to give advance notice of the names of rebuttal witnesses, I question the power of a trial judge to do so. Any lawyer worth his salt should refuse to commit himself in advance as to what witness, or witnesses, he might need for rebuttal. How can he do this until he has heard his adversary's proofs at trial? Discovery depositions are helpful, but witnesses, especially experts, do not always stick to the text of discovery depositions.

"In contrast to his refusal to allow U. S. Steel to call a theretofore unnamed rebuttal witness, the trial judge allowed defendant Hudson Engineering to substitute a new name for one that they had listed as a so-called 'will call' witness. Defendant Hudson Engineering, who had aligned itself with plaintiffs' effort to case blame for the tragic accident upon Steel, thus to exonerate itself, had given the name of its vice-president, Battershell, as a witness it would call. He was identified as the project engineer for Hudson Engineering on the connection work whereby it cut the hole in the pipe alleged to have been furnished by U. S. Steel. A new witness was to be substituted for Battershell because it was urged that Battershell had to be in Australia at the time scheduled for commencement of the trial on June 8. Request to substitute one Darnielle for Battershell was not made until June 5, the Friday before commencement of trial on the following Monday.

"Hudson's brief to this Court offers an explanation of its failure to produce its one employee — a vice-president — who would have known the most about how the work of cutting into the pipe furnished by U. S. Steel and making the so-called connection at the site of the

explosion had been carried on. The explanation is that sometime shortly prior to June 1, 1970, it was thought that the trial would not go ahead on June 8, 1970, the date originally set. However, on June 1, 1970, at a pretrial conference, June 8 was reinstated as the trial date. The brief asserts that Hudson's counsel then said there was a *possibility* that Battershell would have to go to Australia and 'that this trip could not be postponed.' No attempt has been made to tell why Battershell's trip to Australia 'could not be postponed.' My reading of this explanation is that Battershell was still in the United States when the original trial date of June 8, 1970, was reinstated on June 1, 1970. He apparently left on the eve of the trial. With Battershell lately gone to Australia, and no others of Hudson's people who had actually worked on installation of the so-called 'connection' produced, Steel was deprived of the opportunity to make pertinent inquiry of the men who had done the work as to just how such 'connection' had been made. Interrogatories which U. S. Steel had directed to Hudson asked:

"'13. Give the names and addresses of the foreman and all of your employees and representatives who worked on the original installation of the 30" line in question at the North Terrebonne Plant of the Shell Oil Company.'"

* * * *

"'16. Identify the persons who performed the welding operations on the Weldolet unit, or were witnesses thereto, including the welding foreman, superintendent and each welder.'"

Hudson's answers to the foregoing were:

"'13. The following are the p e r s o n n e l, known by Hudson, who worked on the tie-in at the 12" and 30" lines:

Project Engineer: David D. Battershell, 657 Strey Lane, Houston, Texas. [The man who went to Australia]

Superintendent: Ray Hodges, P. O. Box 460, Falfurrias, Texas.

Welding Supervisor: Roy Roberts, c/o Hudson Engineering, 5900 Hillcroft, Houston, Texas.

Testing Supervisor: Frank Brasher, P. O. Box 908, Clute, Texas.'"

"'16. Ray Hodges, Superintendent.
Roy Roberts, Welding Supervisor.
Warren Newman, welder.
Earl Lishman, Jr., welder.
A. J. LeBlanc, welder.
John Kristicevich, welder.'"

These answers show that Edward Darnielle, the witness substituted for Hudson's 'boss man' on the involved job—Project Engineer David D. Battershell—was not mentioned as having anything to do with, or knowing anything about, the job in question. Not one of the persons named in Hudson's above answers were produced at the trial.

"Thus, it will be seen that Hudson Engineering who made the involved installation, and Shell Oil who promptly investigated the cause of the explosion, both did a rather spectacular job of 'hiding out' with their own knowledgable people. U. S. Steel proffered an instruction which would have told the jury,

"'You are instructed that the failure of Hudson to produce witnesses to testify concerning the design of the Wetzolet joinder of the 12 and the 30 without explaining such failure gives rise to the presumption that such witnesses, if produced, would give testimony adverse to the position of Hudson.'

"The District Judge refused to give it.

"The relevant general rule is stated in C.J.S. as follows:

"'It is discretionary with the court whether to give an instruction as to the failure of a party to produce evidence within his control, and a failure to do so is not necessarily error, *although under the circumstances of the case it may be*, * * *.'" 88 C.J.S. Trial § 312, p. 830.

I would not hold that, standing alone, the denial was reversible error or an abuse of discretion. I ponder, however, as to whether, in the total context, fairness would have been served by such an instruction. The failure to give it adds to my concern as to whether the procedure employed detracted from Steel having a fair trial. With some reluctance, I am constrained to say that, however unwittingly, the trial judge did not exercise his discretion with desirable detachment.

"Because of impressions gained from my review of the trial, I am led to the opinion that the District Judge's refusal to allow Steel to use its proposed rebuttal witness visited substantial disadvantage upon it. There is no way, at this distance, to determine what may have been the probative worth or the jury's appraisal of the testimony that might have been given by Steel's

proposed rebuttal witness. I consider that the trial judge's ruling was error—that it was not within his power to deny Steele's request; if his ruling was an exercise of discretion, I would hold that it was an abuse of such discretion.

"I would reverse and remand the cause to the District Court for a new trial."

We submit that the presumption that Battershell would have testified in a manner contrary to the best interests of Hudson should apply in this case. A decision by the Eighth Circuit of recent years in *I. C. Railroad v. Staples*, 272 F.2d 829, (1958) announces the rule in the following language:

"* * * Where witnesses are equally available to either of the parties, no adverse inferences may be drawn from the failure of one party to call them but where witnesses are employees of one of the parties, they are not equally available to the other party, and failure to call them, where it appears that they may have knowledge of some material fact, warrants the inference that had they been called their testimony would have been adverse to the party failing to call them."

The rule is succinctly stated in 20 Am. Jur., Evidence, Section 187, p. 192, as follows:

"It is well settled that if a party fails to produce the testimony of an available witness on a material issue in the case, it may be inferred that his testimony, if presented, would be adverse to the party who fails to call the witness.'

"Where there has been a failure to call available witnesses who may have knowledge of material facts, such failure may properly be referred to in argument of counsel. In the circumstances presented by the record in this case, what is said in Chesapeake & O. Ry. Co. v. Richardson, 6 Cir., 116 F.2d 860, 865, is peculiarly apposite here. In the course of the opinion in that case it is said:

> "'The relationship existing between appellant and the three witnesses was such that each of them might reasonably be presumed to possess knowledge bearing on the issues involved. The unexplained failure of a party to produce a witness under such circumstances is a fit subject for fair comment and may justify an inference unfavorable to the party in default. Wigmore on Evidence, sec. 285, p. 368; Kierce v. Central Vermont Railway, 2 Cir., 79 F.2d 198; Lord & Spencer v. M. N. Stout Co., 1 Cir., 333 F.2d 60. It is a settled rule that counsel must restrict himself to the record for his facts and resort only to reason for his deductions, but within these limits freedom of ample argument is maintained. The extent of allowable comment rests largely in the trial court's discretion. There is no abuse here.'"

See also *Fidelity-Phenix Fire Ins. Co. v. Flota Mercante Del Estado*, 102 F.Supp. 861 (1952), affirmed by Fifth Circuit, 205 F.2d 886 (1953).

The action of the Court in excusing Battershell, a "Will Call" witness listed by Hudson in the pre-trial order, has been prejudicial to Steel for the reason that

Hudson produced no witnesses whatever to testify as to the method of installing the Weldolet, produced none of the welders, none of the workers with the sole exception of Roy Roberts' deposition, who did not witness the installation of the Weldolet.

Undoubtedly Mr. Battershell had made extensive surveys on the property, was the Hudson man most knowledgeable and his testimony in the cross examination had he appeared must be presumed to militate against Hudson.

What studies were made by Hudson on the proposed Weldolet installation before its selection, how was the installation designed from the standpoint of careful engineering, who performed the installation, who performed the welding, what precautions were taken, or not taken, to assure a proper weld, and any other important facets of the case, Battershell, as Vice-President and Project Manager, knew about, and should have known.

The burden is clearly on Hudson to go forward with the proof under these circumstances within its peculiar knowledge. See Vol. 31 (a), C.J.S., par. 113, citing *Kennon, v. Brooks-Scanlan Co.*, 148 La. 120, 86 So. 675 (1920) at 135; *State Board of Medical Examiners v. McHenry*, 69 So.2d 592, 597 (2nd Cir. 1953), citing C.J.S. See also *Rousseau v. Texas & P. R.R.*, 4 La App. 691, 698 (1926).

The burden of evidence—sometimes termed the burden of producing, or going forward with, the evidence, or the burden of procedure *City of New Orleans v. Levy*, 233 La. 844, 98 So.2d 210, 213 (1957) shifts, or may shift, from side to side during the progress of the trial.

City of New Orleans v. Levy, supra; *Wallace v. Shreveport Rys. Co.*, 175 So. 86 (2nd Cir. 1937). Its position at any particular time is controlled by the logical necessities of making proof which a party is under at the time, the burden being always on the party against whom the decision of the tribunal would be given if no further evidence were introduced. *City of New Orleans v. Levy*, supra.

Thus at the beginning of every trial the burden of proof and the burden of evidence as to any particular issue are generally on the same party. *Moody v. Gassen*, 125 So.2d 264 (3rd Cir. 1960). The burden of evidence is so continued until the party having the burden of proof establishes a *prima facie* case, *Moody v. Gassen*, supra; nothing less will shift the burden of evidence. When such a *prima facie* case is established, the burden of evidence is shifted to the adverse party, *Tolar v. K. & G. Contractors*, 214 So.2d 176; appeal after remand, 224 So.2d 202 (4th Cir. 1968); *First National Bank v. Jones*, 186 La. 269, 172 So. 155 (1937). The adverse party may, by the production of evidence destroying the *prima facie* case against him, satisfy the burden and restore it to the original party. *City of New Orleans v. Levy*, supra.

It is desirable that the burden of evidence be imposed on the party best able to sustain it, *State Board of Medical Examiners v. McHenery*, supra. In Louisiana, there is overwhelming authority for the view that the burden of evidence as to an issue rests on the party having the greater means of knowledge, *Rousseau v. Texas & P. R. R.*, supra. A narrower formulation is where the evidence as to an issue is peculiarly within the knowledge or con-

trol of a party, the burden of evidence as to such issue rests on him, *Kennon v. Brooks-Scanlan Co.*, supra. *Miller v. Lykes Bros.-Ripley S.S. Co.*, 98 F.2d 185 (5th Cir. 1938), cert. denied 305 U.S. 641, 59 S.Ct. 150, 83 L.Ed. 413. As far back as the year 1823, the Supreme Court of Louisiana said in the case of *Powers v. Foucher*, 12 Martin 74:

> "In the case of Delery vs. Momet, 11 Martin 4, and that of Michols vs. Roland, id. p. 190, we held that the burden of proof lies on the party who has to support his case by proof of a fact of which he is supposed to be cognizant."

This principle has been followed ever since. It is very generally held that, where the party who has not the general burden of proof possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called on to negative, or has peculiar knowledge or control of the evidence as to such matters, the burden rests on him to produce the evidence *State Board of Medical Examiners, supra; Jackson v. Brewster*, 169 So. 166, 168 (2nd Cir. 1936). In such a case, the negative averment is taken as true unless disproved by the party having such knowledge or control. *State Board of Medical Examiners*, supra; *Collins v. Magee*, 130 So. 267 (1st Cir. 1930).

Where the party on whom rests the burden of evidence as to a particular fact has the essential documents or evidence within his control, a peculiar clearness of proof is demanded, although the fact is negative. *Colorado Coal & Iron Co. v. United States*, 123 U.S.307, 8 S.Ct. 131, 31 L.Ed. 182 (1887).

Applying these principles of law to the facts of the *Laird* case, it is stipulated by the parties that Hudson *designed* and *installed* the 30-inch gas pipeline in question, and joined a 12-3/4-inch gas pipeline to the 30-inch pipeline by means of a Weldolet. As a rule of evidence, it is well-established in Louisiana that:

> "The artisan, craftsman, *builder*, or manufacturer is presumed to know of the vice or defect in the article he *constructs*, manufacturers, or builds." *Tuminello v. Mawly*, 220 La. 733, 57 So.2d 666 (1952). (Emphasis supplied.)

Although the *Tuminello* case, and those cases cited therein, involved rehibitory actions, the rules of evidence with regard to the presumption of knowledge of a defect or vice by a manufacturer or building would seem equally applicable in a suit based on negligence. Thus in *Templeman Bros. Lumber Co. v. Fairbanks*, 129 La. 983, 57 So. 309 (1911), the defendant therein was held liable for the defective installation of a machine. In words highly applicable to the case at hand, the Supreme Court held:

> "*****the defendant must also be held to have known that the engine had been defectively installed. It was its duty to know it, and it had full opportunity to know it. It must, therefore, be presumed to have known it.*". 57 So.2d 666, 668 (Emphasis the Court's)

The French commentators provide strong support for such a position:

> "***a workman, by reason of the profession which he makes of being skilled in his craft***

> renders himself responsible towards all those who contract with him, for the things he makes being fit for the use to which they are naturally destined. His unskillfulness or lack of knowledge in all that concerns his art is a fault which is imputed to him, as no one should publicly make profession of an art if he is not possessed of all the knowledge necessary for exercising it well;" From Pothier, *Vente*, § 214.

Hudson possessed peculiar knowledge concerning the installation of the Weldolet, and the closure of the 12-inch hole in the top of the 30-inch pipeline in question, and so the only remaining question concerns the effect of Hudson's failure to offer any evidence concerning the above-mentioned operation.

In *J. C. Healy Co. v. Burglass*, 1 La. App. 741 (Orl. App. 1925), the Court held that:

> "Defendant's failure to appear at trial or to furnish evidence peculiarly within his knowledge, impels the belief and justifies the conclusion that he could not have overcome or disprove what had been affirmatively alleged and reasonably established.
>
> * * * * *
>
> "* * * it has become a well-established rule that where evidence which would properly be part of a case is within the control of the party whose interest it would be to produce, and without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him."

Similarly, in *Rousseau v. Texas & Pac. R.R.*, supra, the applicable rules were stated as follows:

(1) "When a defendant can by his own testimony throw light upon matters at issue, necessary to his defense and peculiarly within his own knowledge, if the facts exist, and fails to go upon the witness stand, the presumption is raised, and will be given effect to, that the facts do not exist." (Citations omitted.) 4 La.App. 691, 698.

(2) "Failure of a party to call on an available witness possessing peculiar knowledge concerning facts essential to a party's case, direct or rebutting or to examine such witness as to the facts covered by his special knowledge, especially if the witness would naturally be favorable to the party's contention, relying instead upon the evidence of witnesses less familiar with the matter gives use to an inference that the testimony of such uninterrogated witness would not sustain the contention of the party." 4 La. App. 691, 698.

In summary, although Steel, as defendant, had the burden of establishing its cross-claim against Hudson, *Bryant v. Johnson*, 140 So.2d 758 (2nd Cir. 1962), the burden of evidence concerning the proper installation of the Weldolet and the closure of the 12-3/4-inch hole in the 30-inch pipeline shifted to Hudson because of Hudson's peculiar knowledge concerning the installation and closure in question.

The rule that a party is under obligation to produce its own important witnesses should apply here with full vigor, and the Eighth Circuit's rule in *I.C. Railroad v. Staples*, supra, should control. Failure of the district judge to charge the jury as requested was reversible error, as a result of which USS did not obtain a fair trial.

We submit that the failure of Hudson to produce its only knowledgeable official without explanation for its failure so to do mititated heavily against Hudson. The refusal to charge the jury on the point was reversible error.

IV. DOES THE LOUISIANA STATUTE ALLOWING INTEREST ON THE JUDGMENT FROM THE DATE OF JUDICIAL DEMAND IN AN EX DELICTO MATTER BEFORE A JURY VIOLATE THE GUARANTEE OF TRIAL BY JURY IN A CIVIL ACTION WHICH IS GUARANTEED BY THE SEVENTH AMENDMENT TO THE U. S. CONSTITUTION?

The Seventh Amendment prohibits Congress from allowing interest in tort cases because it cannot impose upon the right of trial by jury which did not exist in 1791 when the Bill of Rights was adopted. An important constitutional issue is therefore presented, which has not been determined by the Courts.

Here the District Court allowed interest on the judgment from the date of filing suit at the rate of 5% per annum under the Louisiana Revised Statutes of 1950, R.S. 13:4203, appendix G.

The Circuit Court majority cited its previous decision in *Texaco v. Lirette*, 410 Fed. 2d 1064 (1969) and shrugged off the point. *Texaco* does not determine this issue because it does not consider the constitutionality under the Seventh Amendment.

It only holds that

> "The final issue presented here is whether the court erred in awarding interest from the time judgment was entered, rather than from the time the complaint was filed. In diversity cases, state law governs the award of interest. New Amsterdam Casualty Co. v. Soileau, 5 Cir. 1948, 167 F.2d 767, 6 A.L.R.2d 128. Cf. 28 U.S.C. § 1961. Louisiana requires interest to run from the date of judicial demand, that is the time that the complaint is filed. 13 L.S.A.-R.S. 4203. That rule should be applied here."

Our research discloses no decision on this Constitutional point but the English authorities are clear that interest was not allowed in tort cases before a jury in 1791.

The Seventh Amendment reads:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

It has long been established that in order to ascertain the scope and meaning of the Seventh Amendment, it is necessary to ascertain the appropriate rules of the common law established at the time of the adoption of the Seventh Amendment in 1791. *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935); *Glazer v. Glazer*, 278 F.Supp. 476 (D.C.La. 1968). That is, it is necessary to resort to the practice at common law in similar proceedings as of 1791. *Lewis v. Tennessee Valley Authority*, 108 F.2d 95 (C.C.A. Tenn.

1939), cert. denied 309 U.S. 688, 60 S.Ct. 889, 84 L.Ed. 1030.

The principle that the common law may be adapted to meet varying conditions does *not* apply in determining the scope and meaning of the Seventh Amendment, which, with regard to jury trials, adopted common law rules as they existed in 1791. Thus Congress, in enacting 28 U.S.C. § 1961, cannot impose an impediment upon the right to trial by jury which did not exist in 1791. The established practice and [illegible] of the common law as it existed in England in 17[illegible] bade a court to increase the amount of damage[illegible]ded by a jury in personal injury actions. *Dimi[illegible] Schiedt*, supra. Specifically, with regard to the awarding of interest:

> ". . . by the end of the eighteenth century the common law courts had accepted the view that interest as damages as distinguished from promises to pay interest, express or inferred from conduct or usage, could only be allowed upon a contract for payment of money on a day certain, such as a note or bill of exchange, and seemingly then only in the jury's discretion. *Eddowes v. Hopkins*, 1 Douglas 373, 99 Eng. Rep. 242 (1780). This was only slightly extended by Lord Tenderden's Act, 3 & 4 William IV, c. 2 (The Civil Procedures Act, 1833) in 1833 which provided that the jury 'may, if they shall think fit,' allow interest (a) upon written promises to pay sums certain in money at a definite time, from the day fixed, or (b) in cases of other promises to pay certain sums from the date of written demand, specifically claiming interest, and (c) in actions of trover and trespass for taking personal property." "Interest as Damages," Charles T. McCormick, 9 North Carolina Law Rev. 237 (1930).

Thus, as of 1791, there was no right to recover interest on a judgment sounding in damages *ex delicto* at all, much less interest from the date of judicial demand.

It might perhaps be maintained that the right to interest from the date of judicial demand in an action sounding in damages *ex delicto* is merely a procedural adjunct to the right of action for wrongful death. In line with this view it has been held that the Seventh Amendment is not concerned with forms of procedure and therefore does not require that *rules of procedure* should remain as they were at common law. *Deemer v. United Fruit Co.*, 17 F.Supp. 146 (D.C.Pa. 1936). *See also, Galloway v. United States*, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed.1458.

However, the Fifth Circuit Court of Appeals has ruled that the Louisiana statute providing "interest from the date of judicial demand on all judgments sounding in damages *ex delicto creates a substantive right.*" *New Amsterdam Casualty Co. v. Soileau*, 167 F.2d 767 (C.A. 5th, 1948). Therefore, the Louisiana statute in question is bound by the limitations of the Seventh Amendment.

It has been held by way of dictum by a federal court in Louisiana that the Seventh Amendment has no application to causes of action which were created by statute and were unknown at the time of the adoption of the Amendment. *Bouis v. Aetna Cas. and Sur. Co.*, 98 F. Supp. 176 (D.C. La. 1951). *See also, Olearchick v. American Steel Foundries*, 73 F. Supp. 273 (D.C. Pa. 1947). However, the same court has squarely held that an action to recover damages for injuries, property damage and *death* is an action in the nature of a "suit at common law" in which plaintiffs are entitled to trial by jury under the Seventh Amendment, even though the action was brought under L.S.A.-C.C. Art. 2315, which was enacted in 1855,

Geneux v. Texas & Pacific Ry. Co., 98 F.Supp. 405 (D.C. La. 1951) (W.D., La. Shreveport D.).

It is important to note that it is not "trial by jury," but "the right of a trial by jury," which the Seventh Amendment declares "shall be preserved." *Capital Traction Co. v. Hof*, 174 U.S. 23, 19 S.Ct. 580, 43 L.Ed. 873, 887. Therefore, it is "the *right* of a trial-by jury" which cannot be impaired or taken away by state constitutional or statutory provisions. *Diederich v. American News Co.*, 128 F.2d 144 (C.C.A. Okla. 1942). In addition, litigants in federal courts cannot, by state rules of procedure, be deprived the right to trial by jury. *Lyon v. Mut. Benefit Health & Acc. Assn.*, 305 U.S. 484, 59 S.Ct. 297, 83 L.Ed. 303. The federal courts will not enforce state laws if to so do would violate the Seventh Amendment. *Grocer v. Merritt Development Co.*, 7 F.2d 917 (D.C. Minn. 1925).

Although there is no reported case in which a federal court has examined the problem of interest on judgments in the context of the Seventh Amendment, there are federal cases which have dealt with the right of trial by jury as affected by statutory or procedural regulations involving monetary restrictions. It has been held that the Seventh Amendment right to trial by a jury is *not* infringed by:

a. A statute which sets the pecuniary limit of the jurisdiction of justices of the peace in actions at law higher than it was in 1791, where a trial by jury was allowed upon appeal from the justice of the peace. *Capital Traction Co. v. Hof*; supra.

b. A local rule of a federal district court requiring security for costs. *Zeta v. Penn R. Co.*, 7 F.R.D. 612, (D.C. Pa. 1947).

However, a federal court in Louisiana has held that it is an infringement upon the Seventh Amendment right to a jury trial for a federal judge, in his instructions to the jury in an action for personal injuries, to direct the jury to consider the quantum of damages awarded by state courts in similar cases, even though it was the established rule in Louisiana for a state court to give such an instruction. *Gillen v. Phoenix Indemnity Co.*, 198 F. 2d 147 (CA, 5, 1952).

Similarly, under the Seventh Amendment, courts are without power to add to a verdict in a common law action. *Mutual Ben. Health & Acc. Assn. v. Thomas*, 123 F.2d 353 (C.C.A., Ark. 1941).

In summary, the federal policy favoring jury trials is of historic and continuing strength. *Doughty v. Nebel Towing Co.*, 270 F. Supp. 957 (D.C. La. 1967). Since a statute providing for interest on judgment from date of judicial demand constitutes an infringement of the availability or trial by jury, such a statute is unconstitutional, or is at least supplanted as to this case.

We therefore submit that the question of interest on damage suits for personal injuries cannot be allowed under the Seventh Amendment for the reason that it did not exist at common law at the time of the adoption of the Amendment. At the very least, interest should only be allowed from the date of the judgment under F.R.A.P. Rule 37.

It is the function of the jury to determine all issues of fact under F.R.C.P. Rule 38, as declared by the Seventh Amendment, including the issue of damages. If interest

from the date of judicial demand is an element of damages, then any statute which deprives the jury of that determination is a deprivation of the right to trial by jury under the Seventh Amendment.

Here the jury was not foreclosed from determining the issue of how much interest should be added, and in fact, the enormity of the verdict strongly indicates that they did consider interest. However, the Louisiana statute forecloses defendant from raising these questions with the jury.

The Louisiana statute allows interest on the entire verdict, including the $238,000 award for loss of support. Interest by nature is payment for the loss of use of money which the plaintiffs did not have from the date of judicial demand. Plaintiffs have not been deprived of $238,000 but only of the yearly income from earnings.

In *Capital Traction Co. v. Hof*, supra, the Supreme Court held that a trial by a jury of twelve men before a justice of the peace, having been unknown in England or America before 1776 is not such a trial by jury guaranteed by the Seventh Amendment. But in the instant case trial by jury in tort was permitted at common law in 1776 and 1791 and hence the trial by jury under the Seventh Amendment means that in effect at those times. Hence the imposition of interest, not being available in tort cases before juries in 1776 and 1791 should not be allowed in the case at Bar.

In the case at bar, any statutory provisions to the contrary must yield to the paramount constitutional doctrine that interest should not be allowed in ex delicto

judgments resulting from jury verdicts, pursuant to the provisions of the Seventh Amendment, adopted to common law on the subject as it existed at the time of the amendment's adoption.

We submit that the reasoning and holding of this Court in *Capital Traction* should be followed here. Again, this point is of wide paramount interest to defendants in personal injury cases before juries.

V. THE DISTRICT COURT ERRED IN REFUSING TO ADMIT SHELL'S COMPLETE REPORT INSTEAD OF LIMITING THE OFFER TO THE PHOTOGRAPHS THERETO ANNEXED

The Shell staff's written report carried the factual findings to the effect that the rupture in the pipe "was formed sometime prior to the failure and resulted from residual stresses developed during the fabrication of these residual stresses and subsequent mechanical damage concluded further that the damage to the existing plant would have been lessened by different designs of certain plant components", as Judge O'Sullivan observed at p. 7 of his opinion.

The District Court refused to allow this report in evidence.

We say to the Court that this report by independent experts, not paid by any party other than Shell, is very significant to the outcome of this case and should have been included in connection with the testimony of the two outstanding experts who worked on it, namely, J. B. Frazier and D. D. Hartman, who were called as witnesses by USS and who testified from the report.

As Judge O'Sullivan observed p. 7:

> "None of these Shell investigators, however, was produced by the plaintiffs, by Shell, or by Hudson. The defendant called some of these men, but was denied the opportunity to cross-examine them or use the above report in such examination—this notwithstanding that their employer, Shell Oil, had become a party adverse to U. S. Steel. Their trial testimony can be read as, in some measure, downgrading their first expressed views as being only 'preliminary.' Hudson Engineering was not employed to make the repairs required by the explosion.
>
> "At trial, plaintiffs Hudson Engineering and Shell Oil were aligned in casting blame on Steel. Plaintiffs called as a witness for cross-examination Hudson's named expert who found agreement with plaintiffs' expert in assigning the cause of the explosion to inferior quality of the pipe furnished by Steel. Plaintiffs' proofs were so acceptable to Hudson and Shell that the latter rested their cases at the close of plaintiffs' proofs. By direction of a pretrial order, the jury was required first to determine liability. It exonerated Hudson. It was then directed to assess plaintiffs' damages against U. S. Steel only."

Shell, being a party to the litigation, its own report very pertinent to the issues should not have been excluded by the District Court, but should have been presented to the jury for their consideration. USS was not a party privy to the Shell-Hudson compact and as such is entitled to all factual findings for the jury to consider.

This Shell report by its experts shows that the brittle crack was formed some time prior to the failure and

resulted from residual stresses, and that the damage would have been lessened by a different design of certain plant components, all of which resulted from Hudson's installation.

Hence, Steel was denied the benefit of evidence in its favor and against Hudson. Remand for this error is in order.

CONCLUSION

Each of the five reversible errors urged in this application for certiorari carries strong reasons for this Court to review and reverse the case. In addition, all five points taken together with the unconscionable and excessive award as set forth by Judge O'Sullivan at pp. 8 and 9, demonstrate that U. S. Steel has been the victim of an arbitrary and confiscatory result.

For a replacement of $9,600 annual earnings, the investment of $456,816.63 at 5% would yield $23,000 per annum ad infinitum, or over twice the earnings of the decedent Laird at his death. Certainly the law never intended such a result. Even on the loss of earnings, award of $238,000 at 5% would yield $11,900 per annum and the principal would remain intact in perpetuity.

In conclusion we submit that the "unfairness" found by Judge O'Sullivan, p. 3, is amply supported by the record.

We respectfully submit that the writ of certiorari prayed for should be granted.

LEON SARPY
PAUL A. NALTY
J. DWIGHT LeBLANC, JR.
Attorneys for Petitioners
1500 National Bank of Commerce
Building
New Orleans, La. 70112

OF COUNSEL
CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally come and appeared LEON SARPY, who, after being duly sworn, did depose and say:

That he is one of the attorneys for the applicant in the above and foregoing application and that all of the facts and allegations therein set forth are true and correct to the best of his knowledge, information and belief.

ORIGINAL SIGNED
LEON SARPY
LEON SARPY

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 7th
DAY OF January, 1972.

(s) Gordon & Erwin
Notary Public

CERTIFICATE

I, Leon Sarpy, a member of the Bar of this Court, do hereby certify that I have this day served copies of the above and foregoing application to Mr. Joseph L. Waitz, attorney for Shirley Roberts Laird, et al., and to Mr. Philip McMahon, attorney for Hudson Engineering Corporation, by mailing them, postage prepaid, to the said attorneys at their offices at Houma, Louisiana, on this 7th day of January, 1972.

ORIGINAL SIGNED
LEON SARPY

APPENDIX A

CORRECTED

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30676

SHIRLEY ROBERTS LAIRD, Individually and for and on behalf of the minors MICHAEL GRAY LAIRD and JOHNNY MARK LAIRD,

Plaintiff-Appellee,

versus

HUDSON ENGINEERING CORPORATION,

Defendant-Appellee,

and

UNITED STATES STEEL CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(September 29, 1971)

Before O'SULLIVAN,* THORNBERRY and INGRAHAM, Circuit Judges.

PER CURIAM: In this appeal from a jury verdict below finding the appellant U. S. Steel liable for the

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*Senior Circuit Judge, 6th Circuit, sitting by designation.

wrongful death of plaintiff Laird's husband, U. S. Steel raises some fourteen points of error. The first five points of error attack in one form or another the sufficiency of the evidence to support the jury verdict.

After a review of the Record, we conclude that the evidence was sufficient to support the jury verdict, and satisfies the "sufficiency" standard under which we review jury findings. *Stockton v. Altman*, 5th Cir. 1970, 432 F.2d 946. In its sixth point of error, U.S. Steel complains that interest on the judgment should not have been allowed from the date of judicial demand pursuant to 13 L.S.A.-R.S. 4203, because an award of prejudgment interest violates the appellant's Seventh Amendment right to a jury trial. There is no merit to this contention. This Circuit has recognized in several cases Louisiana's rule on awarding interest from the date of judicial demand, and has upheld the right to such interest. *See, e.g., Texas Co. v. Lirette*, 5th Cir. 1969, 410 F.2d 1064. Appellant's remaining eight points of error attack various discretionary decisions and evidentiary rulings of the trial judge.

We have reviewed each of these contentions and find they all lack merit. Only two of them require comment. U. S. Steel complains of the trial judge's refusal to relax his pre-trial order to allow an additional expert witness to testify for U.S. Steel at the last minute. This was clearly within the trial court's discretion, and we see no abuse of discretion in his refusal to relax the pre-trial order in this instance. Moreover, it appears that the additional expert's testimony would have been cumulative.

U.S. Steel also complains about the trial court's refusal to grant a remittitur as to $238,000.00 in damages awarded the plaintiff for loss of support for herself and her two children. The evidence presented to the jury amply supported this award, and certainly does not warrant any interference by this Court in the trial judge's discretionary decision to deny remittitur. No other point of error as to damages is raised by the appellant.

AFFIRMED.

O'SULLIVAN, Senior U. S. Circuit Judge, dissenting:

I respectfully dissent. I do so because the size of the recovery impelled me to consider whether the trial procedures visited any unfairness upon appellant United States Steel. As set out hereinafter, I am persuaded that such did occur.

Because the majority opinion is silent as to the facts which brought about this lawsuit, I recite those necessary to an exposition of my own views. The amount of $238,000, the figure mentioned in the majority opinion, was awarded for loss of support. Additional amounts allowed for decedent's pain and suffering, for loss of companionship, and for some miscellaneous expenses brought the total recovery to $415,287.85.

Plaintiff's decedent, Malcolm Gray Laird, then 37 years of age, received fatal burns when an explosion occurred in a pipeline located at the premises of Shell

Oil Company near Gibson, Louisiana. The catastrophe occurred on December 17, 1968. Malcolm Laird died on December 28, following. He suffered very great pain during the days that intervened. On the date of the explosion, the deceased, a night shift foreman in the employ of Shell, was earning $800 per month. He was survived by his widow and two minor children, Michael Gray Laird and Johnny Mark Laird, aged 13 and 9, respectively.

This lawsuit was started in the United States District Court for the Eastern District of Louisiana on March 6, 1969, naming as defendants United Gas Industries, Inc., United Pipeline Company and Pennzoil United, Inc. The case against these defendants was dismissed when it was disclosed that they had nothing to do with the installation or operation of the pipeline. On May 2, 1969, an amended complaint was filed naming Hudson Engineering Corporation as defendant and charging it with negligence in the design, construction and fabrication of the gas transmission line and its connection with a gas transmission line owned by Shell Oil Company leading into the latter's plant. The explosion occurred at the place of this connection, and it was established that such connection had been made by Hudson Engineering under contract with Shell Oil Company some four or five years before the explosion. The appellant United States Steel was not named or accused of any wrongdoing in the first amended complaint filed some five months after the fatal accident.

On August 26, 1969, another amended complaint was filed — this time adding the United States Steel as

a defendant, charging that Steel had manufactured and furnished the 30" pipe that made up the main gas line that led to the "connection." This complaint then charged that U. S. Steel *and* Hudson were negligent because of "improper and faulty design, construction, fabrication and manufacture" of the main pipeline and the "connection." Thereafter, Hudson filed a cross-claim against U. S. Steel, its allegations casting the entire blame for the accident upon Steel.

The stage for this disaster was set in 1964 when, pursuant to a contract with Shell Oil, Hudson Engineering constructed a gas processing plant at the site in question. Supplemental to this original contract, Hudson agreed to extend a 30" gas line to the plant at a depth of five feet below the ground from a flange on a previously installed 30" gas transmission line coming in from the Gulf Tidelands. Another gas transmission line, 12 3/4" in diameter and owned by Shell, would intersect with the 30" line at a point some distance from the plant. The 12" line approached the 30" in a perpendicular direction, three feet above the ground, with a valve several feet from the 30". Hudson connected the 12" into the 30" by using a "Weldolet," a device which required cutting a hole in the 30" pipe and welding this Weldolet to the two lines. Except for the explosion on December 17, 1968, there was no evidence of any difficulty with the performance of the 30" pipe which had been furnished by U. S. Steel. It continues in use at the Shell Oil plant.

The case came on for trial to a jury on June 8, 1970, Hudson charging that the inferior quality of the 30"

pipe which had been furnished by Steel was the sole cause of the explosion, and Steel charging that carelessness of Hudson in designing and making the connection was the cause of it. Resolution of the issue of proximate and responsible fault became primarily a contest of experts hired by the antagonists, although Steel produced some of its own people. Hudson produced none of its people who had designed and carried on the work of making the involved connection. Its vice-president, one Battershell, who had been Hudson's project engineer on the job — listed in a pretrial order as a witness it would produce at trial — had gone to Australia at the time of trial and Hudson was allowed to provide a substitute for him. The witness, however, was not called by Hudson but by plaintiffs, whose counsel enjoyed the advantage of cross-examining him as an adverse witness. As discussed later, Steel charges error in this allowed change of witnesses. None of the persons listed at pretrial as those employees of Hudson who had made the installation where the explosion occurred was produced. Shell Oil Company was allowed to intervene as a party plaintiff to seek recovery for the cost of fulfilling its Workmen's Compensation obligations to the widow of the decedent. It charged that the death of its employee resulted from negligence of Hudson Engineering and U. S. Steel. The evidence showed that promptly after the explosion, with the consequent death of its employee and damage to its plant, Shell began an investigation of the scene of the explosion. It used men from its engineering staff, some of whom qualified as experts in the relevant field. The investigating team totalled some six men. They made a written report of their findings which was ambivalent

as to fixing the blame for the casualty. This staff-written report contained the following conclusions:

> "Preliminary conclusions based on visual inspection of the ruptured pipe are that the rupture originated from a brittle crack in the base metal of the 30-inch pipe at the toe of the weld attaching the 30 x 12 Weld-O-Let to the pipe. It appears that the brittle crack was formed some time prior to the failure and resulted from residual stresses developed during the fabrication or from the combination of these residual stresses and subsequent mechanical damage. It is further concluded that damage to the existing plant would have been lessened by different design of certain plant components."

It will be noted that this conclusion did not fix the total blame upon the U. S. Steel pipe, nor forecast the opinions that would be expressed by the experts hired by plaintiffs and Hudson.

None of these Shell investigators, however, was produced by the plaintiffs, by Shell, or by Hudson. The defendant called some of these men, but was denied the opportunity to cross-examine them or use the above report in such examination — this notwithstanding that their employer, Shell Oil, had become a party adverse to U. S. Steel. Their trial testimony can be read as, in some measure, downgrading their first expressed views as being only "preliminary." Hudson Engineer-

ing was not employed to make the repairs required by the explosion.

At trial, plaintiffs Hudson Engineering and Shell Oil were aligned in casting blame on Steel. Plaintiffs called as a witness for cross-examination Hudson's named expert who found agreement with plaintiffs' expert in assigning the cause of the explosion to inferior quality of the pipe furnished by Steel. Plaintiffs' proofs were so acceptable to Hudson and Shell that the latter rested their cases at the close of plaintiffs' proofs. By direction of a pretrial order, the jury was required first to determine liability. It exonerated Hudson. It was then directed to assess plaintiffs' damages against U. S. Steel only.

The judgment entered, $415,287.85, comprised the jury's award to the widow and minor children of plaintiffs' decedent of $238,000 for loss of support, $100,000 for pain and suffering of the deceased during the eleven days that he survived his fatal burns, $70,000 for loss of companionship of the deceased husband and father, and $7,287.85 for medical and funeral expenses. To the figure of $415,287.85 there was added interest at 5% from August 26, 1969, the date when appellant United States Steel was added as a party defendant to the suit. If we may assume that it will take to August 26, 1971, to bring this matter to finality, there will be added to the judgment $41,528.78 for interest, making a total amount to satisfy the judgment of $456,816.63. The deceased's earnings at the time of death were $9,600 per year. If the amount to be paid in satisfaction of the judgment were invested at a yield of 5% per

annum, such investment would yield a yearly income of approximately $23,000 for the remaining life of the plaintiff widow, or for whatever period the sum remained invested, and at the end of such period the entire principal sum would still be intact.[1]

Plaintiffs' proofs included testimony by an actuary who calculated that the earnings of the deceased, had he lived out his total work life expectancy of 26.8 years, would have totalled $353,148. We assume that the reduction to $238,000 portrays the jury's reduction of the actuary's figure upon taking into account the cost of deceased's own support, and their assumption that he would have devoted substantially two-thirds of his income to his wife and two children. Such calculation would permit a recover of about $235,000. This was what plaintiffs' attorney suggested in his closing argument.

In order to come up with his total, plaintiffs' actuary assumed that the deceased's earnings would have increased at the rate of 6% per year, from a $12,000 salary which plaintiffs' testimony averred the deceased would have been earning at the end of three years following the date of his death. This, of course, was an arbitrary assumption. It assumes that in the 26th year of the deceased's expectancy he would be earning about $40,000 per year — contributing two-thirds of it to his wife and children; or to the widow

---

[1] I am aware that reductions must be made for attorney fees and for what will be due to Shell Oil Co., the deceased's employer, for whatever amount it will have paid, up to August 26, 1971, on account of its liability under the applicable Workmen's Compensation Law.

alone after his children had reached their majority. The actuary's calculations were based upon the deceased's present and future earnings in gross, without any factor for the impact of income tax. Thus, his figure was constructed upon an assumption that the deceased would not have had to pay tax upon his ever-increasing income. This is, of course, a distortion.

Just before the jury was to retire, the following colloquy occurred:

> "By Mrs. Gabb [a juror]: May I ask a question? You just said that we should not consider attorneys' fees or costs of court or interest. What about Federal tax on this amount awarded here? Is that taxable?
>
> "By the Court: You are not to consider this. You will make your determination but without regard to *the tax* on the amount that you may award. (Emphasis supplied.)
>
> "By Mr. Sarpy: But there is the income tax on the earnings.
>
> "By the Court: Well, the income tax that Mr. Sarpy referred to was the tax on the possible earnings of Mr. Laird, and the contention that taxes would be withheld on his earnings would affect the amount that would be available for his own support, as well as for the support that he would contribute, or might be expected to contribute, to his wife and children.

"By Mr. Sarpy: Judge, I think the question of tax on the award itself, the Court mentioned that there would be no tax on that.

"By the Court: I did not mention that at all. I said the jury was not to consider that.

"By Mr. Sarpy: Not to consider it?

"By the Court: Whether there was or was not."

I am aware that this Circuit has held that the trial judge is not required to tell the jury that an award of damages in a death or personal injury case is not subject to income tax. *Cunningham v. Bay Drilling Co.*, 421 F.2d 1398 (5th Cir. 1970); *Prudential Ins. Co. v. Wilkerson*, 327 F.2d 997 (5th Cir. 1964). Such also is the rule in the Sixth Circuit case, *Payne v. Baltimore & Ohio R.R.*, 309 F.2d 546, 550 (6th Cir. 1962), *cert. denied*, 374 U.S. 847. The writer dissented on this point, saying:

"Our contemporary public mind is well conditioned to the belief that, today, there is almost nothing of money value which anyone receives that is not shared in substantial degree with the national government. As pointed out by Chief Judge Lumbard in his dissent in McWeeney v. N.Y.N.H. & H.R. Co., 282 F.2d 34, 41 (C.A. 2, 1960), the public today reads of the rather spectacular share that the government takes of large sums won on television quiz programs or in lotteries and sweep-

> stakes.' The public is informed of the amount that is taken in income taxes from large salaries paid to business executives, stars of the entertainment world and other large earners, and the amounts that are taken in taxes from decedents' estates. Have we any assurance that today's juries, awarding verdicts in the range of the one before us, $136,267.23, are aware that, unlike almost any other receipt of money, they are tax free? I would venture a guess that a substantial number of lawyers (excluding those engaged in the personal injury business) would be unsure of the tax consequences of receiving a $100,000.00 personal injury verdict. Should we expect jurors to be better informed?" 309 F.2d at 552-53.

I am satisfied that soon the involved rule will be changed to require some recognition of the patent unfairness of refusing any help to juries who will be unsure of their own responsibilities in arriving at verdicts. See *Domeracki v. Humble Oil & Refining Co.*, ___ F.2d ___ (3rd Cir. 1971), 39 U.S.L. Week 2659, and also Chief Judge Lumbard's dissent in *McWeeney v. New York, N.H. & H.R.R*, 282 F.2d 34, 41 (2d Cir. 1960); and my dissent in *Payne v. Baltimore & Ohio R.R., supra*, 309 F.2d 546, 550 (6th Cir. 1962).

What happened in the case at bar provides, in my view, sound reason for not applying the rule of the cases which merely refused to find reversible error in denying a request upon the point. In this case, defendants' counsel had, in his argument, said to the

jury that the calculation of deceased's earnings had he lived had not taken into account the income taxes that would have had to be paid, and then told the jury, "any amount that you give him will be free from income taxes." Quite obviously, counsel's statement did not satisfy all the jury on the point. I have set out above what the judge told the jury upon inquiry by one of them. At this distance, it would be quite difficult to be sure whether or not the judge's twice mentioning the subject:

> "You will make your determination but without regard *to the tax on the amount* that you may award."

and,

> "I did not mention that at all. I said the jury was not to consider that."

was not, in effect, telling the jury that defendants' counsel had misinformed them when he said that their award would not be subject to tax. Out of all of this, I feel that this jury could indeed have the impression, or at least be unsure, but that plaintiff would have to pay income tax on whatever verdict they gave. I observe that just before the quoted colloquy about income tax, the judge had said to the jury:

> "In further considering the amount Malcolm Laird might have earned, or the amount he would have contributed to the support of his surviving wife and children, you may consider the probabilities of inflation, depression, or a

stable economy. In so doing, you may consider such things as increases and decreases in the cost of living and the wage-price ratio as your own common knowledge and experience may dictate.

"Similarly, in awarding damages, if any, you may consider *the decreased purchasing power of the dollar.*" (Emphasis supplied.)

Having been told these things, clearly calculated to enhance their award of damages, can it be considered fair to have left them with the impression or the passive fear that a large amount of their verdict would be taken for income tax?

Why should we not have the sophistication and courage to baldly recognize that no such verdict would likely have been entered here except for the circumstance that the United States Steel Corporation is the defendant? In a day of much talk about equal protection of the law, should not the courts carefully consider whether a particular verdict came about from the apparent ability of the involved defendant to pay, rather than from a fair measuring of liability and damages?

My brothers, however, do not consider the verdict excessive. Its size, however, and my impressions of some of the trial procedures set out above and hereinafter, urge me to consider whether trial errors contributory to the size of the verdict call for a new trial. See *Home Ins. Co. v. Tydal Co.*, 152 F.2d 309, 311 (5th Cir. 1945); *Sinclair Refining Co. v. Tompkins*, 117 F.2d

596, 597 (5th Cir. 1941). I am of the view that the trial judge committed reversible error in refusing defendant's request to use an expert rebuttal witness because his name was not disclosed in the initial pretrial exchange of names of expert witnesses to be used at the trial. If denial of use of such rebuttal witness would ordinarily be an exercise of discretion by a trial judge, I would, in the total context of the trial involved, hold that the trial judge abused his discretion.

In the majority opinion, my brothers dispose of the trial court's refusal to allow appellant to call a named rebuttal witness as follows:

> "U.S. Steel complains of the trial judge's refusal to relax his pre-trial order to allow an additional expert witness to testify for U. S. Steel *at the last minute*. This was clearly within the trial court's discretion and we see no abuse of discretion in his refusal *to relax the pre-trial order* in this instance. Moreover, it appears that the additional expert's testimony *would have been cumulative*." (Emphasis supplied.)

With great respect, may I observe that appellant's request to call this rebuttal witness did not come *at the last minute*. Neither would it have been contrary to *the pretrial order* to have allowed this rebuttal witness to testify, and we have no way of knowing whether this witness' testimony "*would have been cumulative*." The trial of the case had been set for June 8, 1970. On May 8, 1970, 30 days prior to the trial date,

U. S. Steel's counsel filed a notice that one M. E. Holmberg might be called as an expert witness. Notice of this was given to all counsel of record on the day it was filed. On June 3, 1970, plaintiff filed its opposition to appellant's calling such witness, averring that it would be unfair to allow U. S. Steel "to surprise the other parties with a witness who has not been deposed * * *." On June 3, 1970, the trial judge entered an order denying Steel the right to call the named witness, recognized as a rebuttal witness. The pretrial order of January 6, 1970, referred to above contained the following:

> "In the event there are other witnesses to be called, at the trial, *at least ten (10) days prior*, the names, addresses and the general subject matter of their testimony will be reported to opposing counsel, and a supplemental note of evidence will be filed into the record of the case, but that *this restriction shall not apply to rebuttal witnesses*, the necessity of whose testimony cannot reasonably be anticipated before the time of trial." (Emphasis supplied.)

The plaintiff had ample time between May 8, 1970, and the fixed trial date in which to take a discovery of the witness that defendant proposed to call. It would appear, therefore, that U. S. Steel's notice of its intention to call M. E. Holmberg as a rebuttal witness was not *at the last minute* and the proposal to do so *was not at odds with the pretrial order*. It was given more than ten days prior to trial, and the relevant pretrial

order specifically said that it "did not apply to rebuttal witnesses."

Rule 16, Fed. R.Civ.P. covering pretrial procedure provides for a conference to consider "The limitation of the number of expert witnesses." The order before us did not attempt to set the number of experts to be used by either side. Although this writer has heard that some District Judges, devotees of the asserted virtues of elaborate pretrial, require counsel to give advance notice of the names of rebuttal witnesses, I question the power of a trial judge to do so. Any lawyer worth his salt should refuse to commit himself in advance as to what witness, or witnesses, he might need for rebuttal. How can he do this until he has heard his adversary's proofs at trial? Discovery depositions are helpful, but witnesses, especially experts, do not always stick to the text of discovery depositions.

In contrast to his refusal to allow U. S. Steel to call a theretofore unnamed rebuttal witness, the trial judge allowed defendant Hudson Engineering to substitute a new name for one that they had listed as a so-called "will call" witness. Defendant Hudson Engineering, who had aligned itself with plaintiffs' effort to case blame for the tragic accident upon Steel, thus to exonerate itself, had given the name of its vice-president, Battershell, as a witness it would call. He was identified as the project engineer for Hudson Engineering on the connection work whereby it cut the hole in the pipe alleged to have been furnished by U. S. Steel. A new witness was to be substituted for Battershell because it was urged that Battershell had to be in Aus-

tralia at the time scheduled for commencement of the trial on June 8. Request to substitute one Darnielle for Battershell was not made until June 5, the Friday before commencement of trial on the following Monday.

Hudson's brief to this Court offers an explanation of its failure to produce its one employee — a vice-president — who would have known the most about how the work of cutting into the pipe furnished by U. S. Steel and making the so-called connection at the site of the explosion had been carried on. The explanation is that sometime shortly prior to June 1, 1970, it was thought that the trial would not go ahead on June 8, 1970, the date originally set. However, on June 1, 1970, at a pretrial conference, June 8 was reinstated as the trial date. The brief asserts that Hudson's counsel then said there was a *possibility* that Battershell would have to go to Australia and "that this trip could not be postponed." No attempt has been made to tell why Battershell's trip to Australia "could not be postponed." My reading of this explanation is that Battershell was still in the United States when the original trial date of June 8, 1970, was reinstated on June 1, 1970. He apparently left on the eve of the trial. With Battershell lately gone to Australia, and no others of Hudson's people who had actually worked on installation of the so-called "connection" produced, Steel was deprived of the opportunity to make pertinent inquiry of the men who had done the work as to just how such "connection" had been made. Interrogatories which U. S. Steel had directed to Hudson asked:

"13. Give the names and addresses of the foreman and all of your employees and representatives who worked on the original installation of the 30" line in question at the North Terrebonne Plant of the Shell Oil Company."

* * * *

"16. Identify the persons who performed the welding operations on the Weldolet unit, or were witnesses thereto, including the welding foreman, superintendent and each welder."

Hudson's answers to the foregoing were:

"13. The following are the personnel, known by Hudson, who worked on the tie-in at the 12" and 30" lines:

Project Engineer: David D. Battershell, 657 Strey Lane, Houston, Texas. [The man who went to Australia]

Superintendent: Ray Hodges, P.O. Box 460, Falfurrias, Texas.

Welding Supervisor: Roy Roberts, c/o Hudson Engineering, 5900 Hillcroft, Houston, Texas.

Testing Supervisor: Frank Brasher, P.O. Box 908, Clute, Texas."

* * * *

"16. Ray Hodges, Superintendent.
Roy Roberts, Welding Supervisor.
Warren Newman, welder.
Earl Lishman, Jr., welder.
A. J. LeBlanc, welder.
John Kristicevich, welder."

These answers show that Edward Darnielle, the witness substituted for Hudson's "boss man" on the involved job — Project Engineer David D. Battershell — was not mentioned as having anything to do with, or knowing anything about, the job in question. Not one of the persons named in Hudson's above answers were produced at the trial.

Thus, it will be seen that Hudson Engineering who made the involved installation, and Shell Oil who promptly investigated the cause of the explosion, both did a rather spectacular job of "hiding out" with their own knowledgable people. U. S. Steel proffered an instruction which would have told the jury,

> "You are instructed that the failure of Hudson to produce witnesses to testify concerning the design of the Weldolet joinder of the 12 and the 30 without explaining such failure gives rise to the presumption that such witnesses, if produced, would give testimony adverse to the position of Hudson."

The District Judge refused to give it.

The relevant general rule is stated in C.J.S. as follows:

> 'It is discretionary with the court whether to give an instruction as to the failure of a party to produce evidence within his control, and a failure to do so is not necessarily error, *although under the circumstances of the case it may be*, * * *." 88 C.J.S. Trial § 312, p. 830.

I would not hold that, standing alone, the denial was reversible error or an abuse of discretion. I ponder, however, as to whether, in the total context, fairness would have been served by such an instruction. The failure to give it adds to my concern as to whether the procedure employed detracted from Steel having a fair trial. With some reluctance, I am constrained to say that, however unwittingly, the trial judge did not exercise his discretion with desirable detachment.

Because of impressions gained from my review of the trial, I am led to the opinion that the District Judge's refusal to allow Steel to use its proposed rebuttal witness visited substantial disadvantage upon it. There is no way, at this distance, to determine what may have been the probative worth or the jury's appraisal of the testimony that might have been given by Steel's proposed rebuttal witness. I consider that the trial judge's ruling was error — that it was not within his power to deny Steel's request; if his ruling was an exercise of discretion, I would hold that it was an abuse of such discretion.

I would reverse and remand the cause to the District Court for a new trial.

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APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30676

D. C. Docket No. CA 69-478

SHIRLEY ROBERTS LAIRD, Individually and for and on behalf of the minors MICHAEL GRAY LAIRD and JOHNNY MARK LAIRD,
Plaintiff-Appellee,

versus

HUDSON ENGINEERING CORPORATION,
Defendant-Appellee,

and

UNITED STATES STEEL CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

Before O'SULLIVAN,* THORNBERRY and INGRAHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF; It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee and defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

September 29, 1971

O'SULLIVAN, Senior U. S. Circuit Judge, dissenting:

Issued As Mandate:

*Senior Circuit Judge, 6th Circuit, sitting by designation.

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APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

SHIRLEY ROBERTS LAIRD
Individually and for and on
behalf of the minors Michael
Gray Laird and Johnny Mark Laird

NO. 69-478

versus

CIVIL ACTION

HUDSON ENGINEERING CORPORATION
and
UNITED STATES STEEL CORPORATION

SECTION D

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT PURSUANT TO FRAP RULE 3(c)

Notice is hereby given that United States Steel Corporation, one of the defendants above-named, hereby appeals to the United States Court of Appeal for the Fifth Circuit from the final judgment entered in this action on the 25th day of June, 1970.

Dated at New Orleans, Louisiana, this 9th day of July, 1970.

CHAFFE, McCALL, PHILLIPS,
BURKE, TOLER& SARPY

BY: _____
ORIGINAL SIGNED
Attorneys for United States
Steel Corporation

APPENDIX D

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

ROOM 408-400 ROYAL ST.
NEW ORLEANS, LA. 70130
(504) 527-6514

October 28, 1971

TO ALL PARTIES LISTED BELOW

Re: No. 30676 - Shirley Roberts Laird, etc., et al
vs. Hudson Engineering Corp., et al

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By Dorma Brady
Deputy Clerk

/dlb

cc: Messrs. Leon Sarpy
Paul A. Nalty
James R. Nieset
Messrs. Joesph L. Waitz
Michael So. Martin
Mr. Phillip J. McMahon
Mr. James H. Drury

FPI MI—7-15-68-BM-2411

U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
Jul 10 13 42 PM '70
BENJAMIN F. REISCH
CLERK

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

SHIRLEY ROBERTS LAIRD Individually and for and on behalf of the minors Michael Gray Laird and Johnny Mark Laird

versus

HUDSON ENGINEERING CORPORATION and UNITED STATES STEEL CORPORATION

NO. 69-478

CIVIL ACTION

SECTION D

CORRECTED
JUDGMENT

Considering the answers of the Jury to interrogatories propounded to it by the Court at the trial of this matter from June 8 through June 18, 1970, the direction of the Court as to entry of judgment and considering the agreement of counsel for plaintiff and United States Steel Corporation that the interest on the award for pain and suffering in excess of $40,000.00 shall begin to run not earlier than May 25, 1970, the date the amended complaint was filed praying for an increased award for pain and suffering,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Shirley Roberts Laird, Individually, and against defendant, United States Steel Corporation, in the full sum of $250,000.00 with interest at the rate of five (5%) per cent per annum on $220,000.00 from August 26, 1969 until paid, and on $30,000.00 from May 25, 1970 until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Shirley Roberts Laird, for and on behalf of the minor, Michael Gray Laird, and against defendant, United States Steel Corporation, in the full sum of $75,000.00 with interest at the rate of five (5%) per cent per annum on $60,000.00 from August 26, 1969 until paid, and on $15,000.00 from May 25, 1970 until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Shirley Roberts Laird, for and on behalf of the minor, Johnny Mark Laird, and against defendant United States Steel Corporation, in the full sum of $83,000.00 with interest at the rate of five (5%) per cent per annum on $68,000.00 from August 26, 1969 until paid, and on $15,000.00 from May 25, 1970 until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Shirley Roberts Laird, individually, and for and on behalf of the minors, Michael Gray Laird and Johnny Mark Laird, and against defendant, United States Steel Corporation, in the full sum of $7,287.85, representing expense incurred for the medical treatment of the decedent, Malcolm Gray Laird, in the amount of $5,665.65 and expense incurred for the burial of said Malcolm Gray Laird in the amount of $1,622.30, with interest at the rate of five (5%) per cent per annum from August 26, 1969, until paid, and for all costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Hudson Engineering Corporation, and against plaintiff, Shirley Roberts Laird, individually, and for and on behalf of the minors, Michael Gray Laird and Johnny Mark Laird, dismissing plaintiff's suit at her cost.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Hudson Engineering Corporation, and against United States Steel Corporation, dismissing the cross-claim of United States Steel Corporation against Hudson Engineering Corporation with costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of United States Steel Corporation and against Hudson Engineering Corporation, dismissing the cross-claim of Hudson Engineering Corporation against United States Steel Corporation with costs.

BEST AVAILABLE COPY

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Shell Oil Company is to be paid by preference and priority out of the amount of the judgment herein in favor of the plaintiff, Shirley Roberts Laird, individually, the sum of $6,565.65, representing medical, hospital and funeral expenses, plus $35.00 per week in weekly payments under the Louisiana Workmen's Compensation Act, from December 17, 1968 until the present time and continuing until the judgment rendered herein becomes final and is satisfied.

New Orleans, Louisiana, this 10th day of July, 1970.

BENJAMIN W. REISCH, CLERK

BY: Nelson B. Jones
CHIEF DEPUTY CLERK

APPROVED AS TO FORM:

UNITED STATES DISTRICT JUDGE

Michael K. St. Martin, Esq.
Attorney for Plaintiff

Leon Sarpy, Esq.
Attorney for United States Steel Corporation

John V. Baus, Esq.

Philip J. McMahon, Esq.
Edmund McCollam, Esq.

Paul Nalty, Esq.
James Nieset, Esq.

James H. Drury, Esq.

BEST AVAILABLE COPY

APPENDIX F

28 U. S. Code 1961

"§1961. Interest

"Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law. June 25, 1948, c. 646, 62 Sta. 957."

APPENDIX G

Louisiana Revised Statutes 13:4203

"§ 4203. Interest on judgments from judicial demand in ex delicto cases

"Legal interest shall attach from date of judicial demand, on all judgments, sounding in damages, 'ex delicto', which may be rendered by any of the courts. "

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE

FIFTH CIRCUIT.

NO. 30676

U.S. COURT OF APPEALS
FILED
NOV 10 '71
EDWARD W. WADSWORTH
CLERK

SHIRLEY ROBERTS LAIRD, IND., ETC.,

Plaintiff-Appellee,

versus

HUBSON ENGINEERING CORP.,

Defendant-Appellee,

and

UNITED STATES STEEL CORPORATION,

Defendant-Appellant.

BEST AVAILABLE COPY

Appeal from the United States District Court
for the Eastern District of Louisiana

O R D E R:

ON CONSIDERATION of the motion of defendant-appellant for stay of the issuance of mandate in the above entitled and numbered cause, and of the opposition of plaintiff-appellee thereto,

IT IS ORDERED that said motion be, and it is hereby DENIED.

UNITED STATES CIRCUIT JUDGE

BEST AVAILABLE COPY

APPENDIX I

Supreme Court of the United States

No. A-515 ----, October Term, 10

UNITED STATES STEEL CORPORATION,

Petitioner,

v.

SHIRLEY ROBERTS LAIRD, INDIVIDUALLY, ETC., ET AL.

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner, and of the brief filed in opposition thereto,

IT IS ORDERED that the mandate of the U. S. Court of Appeals for the Fifth Circuit be, and the same is hereby, stayed pending the timely filing of a petition for a writ of certiorari in this Court. If the petition for a writ of certiorari is timely filed, then this stay is to remain in effect pending disposition of the petition for a writ of certiorari.

/S/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 16th
day of November, 1971.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
FEB 4 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-894

UNITED STATES STEEL CORPORATION,
Petitioner,

versus

SHIRLEY ROBERTS LAIRD, Individually and for and on behalf of the minors MICHAEL GRAY LAIRD and JOHNNY MARK LAIRD,

and

HUDSON ENGINEERING CORPORATION,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH L. WAITZ
MICHAEL X. ST. MARTIN
Attorneys for Respondent
SHIRLEY ROBERTS LAIRD,
Individually and for and
on behalf of the minors
MICHAEL GRAY LAIRD
and JOHNNY MARK LAIRD
409 American Bank Building
Houma, Louisiana 70360

OF COUNSEL
WAITZ & ST. MARTIN

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. 71-894

UNITED STATES STEEL CORPORATION,
Petitioner,

versus

SHIRLEY ROBERTS LAIRD, Individually and for and on behalf of the minors MICHAEL GRAY LAIRD and JOHNNY MARK LAIRD,
and
HUDSON ENGINEERING CORPORATION,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NOW INTO COURT through undersigned counsel comes Shirley Roberts Laird, Individually and for and on behalf of the minors Michael Gray Laird and Johnny Mark Laird, respondents herein, who respectfully urge this Honorable Court to deny the Writ of Certiorari petitioned for by United States Steel Corporation on the grounds that the judgment of the District Court predicated on a jury verdict in the total sum of $415,-287.85 was affirmed by the United States Court of Appeals for the Fifth Circuit on September 29, 1971.

STATEMENT OF THE CASE

Petitioner in its Statement of the Case, as is expected, quotes to the Court the dissenting opinion of Circuit Judge O'Sullivan without quoting the majority opinion of the Fifth Circuit Court of Appeals. Therefore, in accordance with Rule 40 of this Court we are compelled and deem it necessary to quote the majority opinion of the Court of Appeals to correct the inaccuracies in the dissenting opinion, which forms petitioner's Statement of the Case. The majority opinion reads:

> "PER CURIAM: In this appeal from a jury verdict below finding the appellant U. S. Steel liable for the wrongful death of plaintiff Laird's husband, U. S. Steel raises some fourteen points of error. The first five points of error attack in one form or another the sufficiency of the evidence to support the jury verdict.
>
> After a review of the Record, we conclude that the evidence was sufficient to support the jury verdict, and satisfies the 'sufficiency' standard under which we review jury findings. *Stockton v. Altman*, 5th Cir. 1970, 432 F.2d 946. In its sixth point of error, U. S. Steel complains that interest on the judgment should not have been allowed from the date of judicial demand pursuant to 13 L.S.A.-R.S. 4203, because an award of prejudgment interest violates the appellant's Seventh Amendment right to a jury trial. There is no merit to this contention. This Circuit has recognized in several cases Louisi-

ana's rule on awarding interest from the date of judicial demand, and has upheld the right to such interest. See, e.g., *Texas Co. v. Lirette*, 5th Cir. 1969, 420 F.2d 1064. Appellant's remaining eight points of error attack various discretionary decisions and evidentiary rulings of the trial judge.

We have reviewed each of these contentions and find they all lack merit. Only two of them require comment. U. S. Steel complains of the trial judge's refusal to relax his pre-trial order to allow an additional expert witness to testify for U. S. Steel at the last minute. This was clearly within the trial court's discretion, and we see no abuse of discretion in his refusal to relax the pre-trial order in this instance. Moreover, it appears that the additional expert's testimony would have been cumulative.

U. S. Steel also complains about the trial court's refusal to grant a remittitur as to $238,000.00 in damages awarded the plaintiff for loss of support for herself and her two children. The evidence presented to the jury amply supported this award, and certainly does not warrant any interference by this Court in the trial judge's discretionary decision to deny remittitur. No other point is raised by the appellant.

AFFIRMED."

ARGUMENT

As members of the bar and officers of the Court we feel compelled to comment on certain language used by the Sixth Circuit Judge O'Sullivan in his dissenting opinion.

After thoroughly reviewing his opinion this Court will find that Circuit Judge O'Sullivan could not find any errors of law but merely an abuse of discretion on the part of the District Judge.

We quote the last two paragraphs of Circuit Judge O'Sullivan's dissenting opinion at page 21:

> "I would not hold that, standing alone the denial was reversible error or an abuse of discretion. I ponder, however, as to whether, in the total context, fairness would have been served by such an instruction. The failure to give it adds to my concern as to whether the procedure employed detracted from Steel having a fair trial. *With some reluctance, I am constrained to say that, however unwittingly, the trial judge did not exercise his discretion with desirable detachment.*
>
> Because of impressions gained from my review of the trial, I am led to the opinion that the District Judge's refusal to allow Steel to use its proposed rebuttal witness visited substantial disadvantage upon it. There is no way, at this distance, to determine what may have been the probative worth of the jury's apprais-

> al of the testimony that might have been given by Steel's proposed rebuttal witness. I consider that the trial judge's ruling was error — that it was not within his power to deny Steel's request; if his ruling was an exercise of discretion. I would hold that it was an abuse of such discretion." (Emphasis added)

The District Court Judge is of the highest caliber. He is held in high esteem by members of the local bar, by his colleagues and by the Judges of the Fifth Circuit Court of Appeals. His record is outstanding.

As attorneys we are bound by the Rules of Ethics not to criticize Judges, however, we are not prohibited from coming to their rescue when their reputations are slandered.

We respectfully request this Court order stricken from the dissenting opinion that sentence emphasized above.

We will now answer each contention of petitioner in the order set forth in its brief.

I. The District Judge Erred In Failing To Charge The Jury As To The Effect Of Income Taxes Against The Award And Also Against Loss Of Earnings.

Petitioner argues, based on Judge O'Sullivan's dissent, that the District Court had the discretion to tell or not to tell the jury that an award of damages in

a death or personal injury case is not subject to income taxes.

However, the two cases cited by Judge O'Sullivan from the Fifth Circuit, namely *Cunningham v. Bay Drilling Co.*, 421 F.2d 1398 (5th Cir., 1970) and *Prudential Ins. v. Wilkerson*, 327 F.2d 997 (5th Cir., 1964) both hold that the District Court's refusal, in each case to instruct the jury that the amount of the recovery was not subject to federal or state income taxes, was proper.

Judge O'Sullivan then goes on to admit that the rule is the same in the Sixth Circuit from whence he comes.

The District Court followed the law as given to him by the Fifth Circuit Court of Appeals as he was bound to do.

It is contended by counsel for U. S. Steel that he requested the jury be charged that income taxes should be considered by the jury in arriving at an award but "the District Court instructed the jury to the contrary." (Petitioner's brief, page 10). It is not true that the District Court instructed the jury to the contrary.

The District Judge refused to charge the jury one way or the other with regard to taxes on the *award* or *verdict*.

Counsel for petitioner argued to the jury that in *arriving* at an *award* or *verdict*, the jury could consider that the future earnings of the decedent would be tax-

able and thus affect the amount available for the support of his wife and children.

Mrs. Gabb, a juror, asked if there would be Federal tax on the *award* or *verdict*. This colloquy between the juror, counsel for petitioner and the District Judge is set forth in Judge O'Sullivan's dissent at page 10 and reads:

> "'By Mrs. Gabb (a juror): May I ask a question? You just said that we should not consider attorneys' fees or costs of court or interest. What about Federal tax on this amount awarded here? Is that taxable?
>
> "'By the Court: You are not to consider this. You will make your determination but without regard to *the tax* on the amount that you may award. (Emphasis supplied.)
>
> "'By Mr. Sarpy: But there is the income tax on the earnings.
>
> "'By the Court: Well, the income tax that Mr. Sarpy referred to was the tax on the possible earnings of Mr. Laird, and the contention that taxes would be withheld on his earnings would affect the amount that would be available for his own support, as well as for the support that he would contribute, or might be expected to contribute, to his wife and children.
>
> "'By Mr. Sarpy: Judge, I think the question of tax on the award itself, the Court mentioned that there would be no tax on that.

"'By the Court: I did not mention that at all. I said the jury was not to consider that.

"'By Mr. Sarpy: Not to consider it?

"'By the Court: Whether there was or was not.'"

The District Judge clearly told the juror she was not to consider the question of taxes on the *award* or *verdict*, if any. Counsel for petitioner raised the issue of income taxes on the decedent's future earnings and the District Court explained this to the jury. Then counsel for petitioner, in open court and in the presence of the jury, tried to confuse the jury, and the District Judge again stated that the jury was not to consider whether the award was taxable or not.

Counsel for petitioner attempted to create confusion and doubt in the minds of the jurors but each time the District Judge stated that the jury was not to consider the question of taxes on the *award*. The jury understood perfectly what was happening.

Finally, counsel for petitioner argues that there is a conflict between the Circuits on this issue. The case of *Domeracki v. Humble Oil & Refining Company*, 443 F.2d 1245 (CCA-3, 1971) is cited to this Court as being in conflict with the Fifth Circuit cases cited.

The language of the *Domeracki* case quoted to this Court by petitioner at page 15 of its brief states:

> "We decline, however, to reverse the judgment of the court below. Two important considerations influence this determination. First, the purpose of the rule which we promulgate for prospective application in this Circuit is to remove the possibility that juries will increase awards based on mistaken considerations of tax consequences. In the case at bar, however, there is no evidence that the jury was in fact so motivated, and because of the settled rule, heretofore discussed, that the sanctity of jury deliberations may not be invaded subsequent to the rendition of the verdict, any inquiry is now foreclosed."

We submit that if this Court should reverse the Fifth Circuit decisions and uphold the decision of the Third Circuit in *Domeracki*, then the application of the rule should be prospective and the sanctity of this jury's deliberations should not be invaded.

II. The District Judge Failed To Instruct The Jury That Unexplained Failure To Produce Its Knowledgeable Vice President Who Knew All About The Construction By Hudson, Created A Presumption That Had He Been Produced His Testimony Would Have Been Adverse To The Interests Of Hudson Engineering Company, The Third Party Defendant, Which Was Reversible Error.

Petitioner claims that it was prejudiced by the District Court when it allowed Hudson to substitute Edward Darnielle for Mr. Battershell, a "will call" witness, and in failing to instruct the jury that failure

to produce Mr. Battershell gave rise to the presumption that his testimony would be adverse to Hudson.

This second contention by petitioner is based on its cross-claim against Hudson and does not involve the plaintiff. If the District Court did err, it was as to the cross-claim between the defendants, therefore, the verdict in favor of the plaintiff should not be disturbed.

As to the substitution of Darnielle for Battershell we believe that neither the petitioner nor Judge O'Sullivan in his dissent have fully disclosed what transpired. Therefore, in an attempt to put forth all of the facts, we quote from Hudson's brief to the Fifth Circuit, which reads as follows:

> "Steel, in its brief, argues that Hudson's failure to produce David D. Battershell as a witness resulted in a presumption that Battershell's testimony would have been against the interest of Hudson. This position, in light of the true facts, is completely absurd and cannot be supported in any manner by either law or logic. To best understand exactly what happened it is necessary to go back to the start of this case. David D. Battershell was the vice president of Hudson who had the complete charge of the project entitled "North Terrebonne Plant," and as such was listed by Hudson on its will call list. The record herein will show that United States Steel became a party to this litigation by amended petition on August 26, 1969. On August 29, 1969, the deposition of David D. Battershell was taken in Houston, Texas, and

due to its recent participation in the litigation United States Steel was not a party at this deposition, However a copy was furnished to them, as evidenced by the fact that the deposition of David D. Battershell was listed as an exhibit by United States Steel (See Steel No. 10A). This case was set for trial on June 8, 1970, and in accordance with this David D. Battershell was informed that he would be a witness at the trial and had made the necessary preparations to allow him to do this. Approximately three weeks before this trial all of the participating attorneys in this trial were informed by the trial Judge that this case could not be tried on June 8, 1970, because of the fact that another case would be tried then. Instead of giving the attorneys a new trial date at this time, the attorneys were informed to come to the pre-trial conference which had been set for June 1, 1970, and at that time a new date would be given. Accordingly Hudson's attorney notified the Hudson personnel that the case would not be tried. On June 1, 1970, at the pre-trial conference the Judge informed all parties that the case would be tried on June 8, 1970. At this time the Court and all attorneys were informed by this writer that there was a possibility that David D. Battershell would have to go to Australia, and that this trip could not be postponed. On June 2, 1970, the undersigned was informed that David D. Battershell would be in Australia during the trial of this matter and that this trip could not be rescheduled. At this time notices were sent to all attorneys and the

presiding Judge in the form of an Amended Pre-Trial Order and Supplemental Note of Evidence. On Friday, June 5, 1970, due to the objection of United States Steel, a telephone conference was held between the presiding Judge and all parties to this suit, and after hearing arguments it was decided that Hudson would be allowed to substitute Edward Darneel as a witness. At this time I would like to point out that United States Steel Corporation at no time objected to the fact that D. D. Battershell would not be present. Their sole objection was to Hudson's use of Edward Darneel as a witness. Hudson Engineering Corporation was informed by the Court that although Edward Darneel could be used as a fact witness he could not be used as an expert witness. Additionally, at the request of United States Steel Corporation, Hudson was ordered and directed to produce Edward Darneel in the office of Leon Sarpy, Attorney for United States Steel Corporation, on Sunday, June 7, 1970, to allow United States Steel to take the deposition of Edward Darneel. Additionally the Court further ordered that Edward Darneel would not be allowed to testify as a witness until United States Steel received a copy of Darneil's deposition taken on June 7, 1970. According to the orders of this Court Edward Darneel was produced and his deposition taken by United States Steel on June 7, 1970.

The record will show that United States Steel became a party to this litigation, by Amended

Petition, on August 26, 1969. On August 29, 1969, the deposition of D. D. Battershell was taken in Houston, Texas. Due to its recent participation in the litigation, United States Steel was not a party at this deposition, however copy thereof was furnished to them as evidenced by the fact that the deposition of D. D. Battershell is listed as a possible Exhibit by United States Steel Corporation.

As previously stated, at no time did United States Steel complain or object to the fact that D. D. Battershell was not available at the time of this trial. Although United States Steel now regards Mr. Battershell as a "salient witness" and a "most important witness," this designation did not appear before the trial since United States Steel made no attempt to depose David D. Battershell. They also resisted plaintiff's attempt to introduce the deposition of David D. Battershell at the trial on the merits. Clearly David D. Battershell's alleged importance can only be of recent vintage. With this in mind we cannot help but wonder exactly what Steel feels Battershell would have testified. If this important, salient and necessary information was contained in his deposition we can only wonder why this deposition was not introduced. If this information was not contained in the deposition then how did Steel become aware of this "salient information", and why was it not developed by proper discovery procedures. As stated previously at no time did Steel object to the fact that David D. Batter-

shell would not be available at the trial. They only objected to the fact that Edward Darnielle would be substituted. Any possible inequities to Steel caused by the substitution were clearly erased when the trial Judge instructed Hudson to produce Darnielle in Steel's attorney's offices the day before the trial and when he further refused to allow plaintiff to use Darnielle as a witness until Darnielle's deposition had been typed up and a copy placed in Steel's hand. This procedure is set forth on page 320 of the transcript. The same testimony clearly shows the limitations of Steel's objections at that time. Now, after the trial is over, this writer is amazed to find that during the trial Darnielle possessed little information relating to the construction contract. This is more amazing when, upon examination of the transcript, one finds that Edward Darnielle has testified for approximately one hundred ten (110) pages. Steel's brief would have this Court believe that Hudson produced no evidence of any kind that in any way substantiated or proved the allegations that they were without fault when joined the two pipe lines. As stated previously, the testimony of Darnielle clearly shows that all factors were considered by Hudson before this work was started. The testimony of Weaver (Weaver 625) shows that all work done by Hudson was within the applicable codes. The testimony of Neff, Shell's project engineer, who was called as Steel's witness, clearly illustrates the point that the decision to use the weldolet was Shell's, and

that it was within the applicable codes. Neff further testified that the very same noggle intersection schedule, (Hudson No. 1) that was used on this job, is still being used by Shell today. In other words if Shell would connect two similar lines today a weldolet would be the fitting used. Neff further testified that in his opinion the design employed by Hudson at the joining of these lines was satisfactory and acceptable under the codes. Last, but certainly not least, was the testimony of Dr. John V. Pennington. In this writer's opinion Dr. Pennington's credentials clearly show that he was the most qualified of all of the expert witnesses who testitfied during the trial. (1631) He testified as to the use of the weldolet and the fact that it was commonly used throughout the industry and was clearly acceptable under the codes. His testimony as to the design was to the effect that if anything the design was conservative. He further testified to each and every allegation of fault and improper use which was stated by Dr. Doty. Each of Dr. Doty's statements were immediately and completely refuted by Dr. Pennington.

As stated previously Dr. Doty was the only witness who testified that there was anything improper in the use of the weldolet or improper in Hudson's design. The cross examination of Dr. Doty revealed that all of his allegations were made without any factual background whatsoever and were pure assumptions which

were completely unsupported by fact. Obviously the jury sensed this immediately."

It is quite clear that Steel did not object to the substitution of Darnielle for Battershell at the time of trial and is now estopped from doing so.

Petitioner contends it was error for the District Court to refuse the following jury charge quoted in Judge O'Sullivan's dissenting opinion at page 20:

> "You are instructed that the failure of Hudson to produce witnesses to testify concerning the design of the Weldolet joinder of the 12 and the 30 without explaining such failure gives rise to the presumption that such witnesses, if produced, would give testimony adverse to the position of Hudson."

After instructing the jury the Court ruled on the requested jury charges submitted by the parties.

Counsel for petitioner stated: (Vol. 4 page 1822)

> BY THE COURT: "Seventeen and eighteen were denied, along with six, seven and fourteen. All right, gentlemen, you may note your objections."
>
> BY MR. WAITZ: "I have none, Your Honor."
>
> BY MR. McMAHON: "No objections, Your Honor."

BY MR. [illegible]RPY: "We have none, Your Honor, except to renew, with regard to seventeen and eighteen, which was denied."

The jury charge quoted above was petitioner's number seventeen referred to by counsel for petitioner in his objection.

We submit that the objection of counsel for petitioner to the District Court's refusal to give its requested jury charge number seventeen was not sufficient because it was a general objection and did not comply with Rule 51 of the Federal Rules of Civil Procedure as interpreted by the case of *Delancey v. Motichek Towing Service, Inc.*, 14 FR Serv. 2d 282 (CA. 5th, 1970).

Petitioner cites various Louisiana cases to this Court standing for the proposition that once a party has established a prima facie case the burden shifts to the opposing party to present evidence in its behalf, and accordingly, when that party fails to produce a knowledgeable witness a presumption arises or exists, that had the witness testified, his testimony would have been adverse to that party failing to call that witness.

We submit to the Court that the requested jury charge is based upon rules of evidence which are procedural in nature and that accordingly in this diversity case the Federal Rules of Evidence are applicable and not the Louisiana law of evidence.

Accordingly, we submit that the District Court, after allowing Mr. Darnielle to be substituted for Mr. Battershell, without objection by United States Steel Cor-

poration and after Darnielle was produced and did testify, was justified in not giving the requested jury charge which was within the District Court's discretion.

III. The District Court Discriminated Against USS By Allowing An Unlisted Witness, Darnielle, To Testify For Hudson And Refusing To Allow USS's Listed Expert Witness, Holmberg, To Testify.

The United States Court of Appeals for the Fifth Circuit in its majority opinion stated with regard to the above contention:

> "U.S. Steel complains of the trial judge's refusal to relax his pre-trial order to allow an additional expert witness to testify for U.S. Steel at the last minute. This was clearly within the trial court's discretion, and we see no abuse of discretion in his refusal to relax the pre-trial order in this instance. Moreover it appears that the additional expert's testimony would have been cumulative."

Judge O'Sullivan in his dissent incorrectly refers to Holmberg as a *rebuttal* witness and further states that there was no way of knowing if the witness' testimony would have been cumulative.

In support of the majority opinion we quote from the minute entry of January 6, 1970 which was formulated at the pre-trial conference and served on all attorneys of record. The entry reads: (See Appendix 3)

"2. (a) Not later than February 20, 1970, counsel for plaintiff and defendant, United States Steel Corporation, shall exchange with each other, and shall furnish to counsel for defendant, Hudson Engineering Corporation, copies of reports and opinions of experts to be called as witnesses by each.

"(b) Within 20 days after receipt by counsel for defendant, Hudson Engineering Corporation, from counsel for plaintiff and defendant, United States Steel Corporation, of the aforesaid reports and opinions, and in any event not later than 20 days after February 20, 1970, counsel for Hudson Engineering Corporation shall furnish to counsel for plaintiff and United States Steel Corporation copies of reports and opinions of experts to be called as witnesses by Hudson Engineering Corporation."

In accordance with this entry, reports of all experts were exchanged by the cut-off date. No report was ever given by Steel relating to Mr. Holmberg, nor in fact did Steel ever mention the possibility of Holmberg's testimony. Mr. A. H. Quay, U.S. Steel's independent metallurgist was associated with Metallurgical Consultants, Inc. of Houston, Texas. Mr. Holmberg is also associated with Metallurgical Consultants, Inc., Houston, Texas. Obviously, U. S. Steel was trying to get the most mileage out of one metallurgical firm by bringing in two separate members of the firm to testify. Apparently, their intentions were to have Mr. Quay testify as to what he did and then have Mr. Holmberg state that everything Quay did was correct. Neith-

er attorneys for respondents were ever given the opportunity to depose Holmberg.

It is true as pointed out in Judge O'Sullivan's opinion that USS filed a supplemental note of evidence on May 8, 1970, 30 days prior to the trial, which was opposed by counsel for respondents.

It is also true as Judge O'Sullivan points out that the pre-trial order allows counsel to list additional witnesses ten days prior to trial.

However, Judge O'Sullivan does not refer to or mention the minute entry of January 6, 1970 referred to above which was formulated at the pre-trial conference and which was to control the preparation of the case for trial. The trial Judge specifically ordered counsel to exchange reports "not later than 20 days after February 20, 1970." Counsel for USS in complete disregard of the District Judge's order attempted to list an expert witness at the last minute. USS states that 30 days was sufficient, however when one considers that the report of this expert had to be written and exchanged, and rebuttal experts would have to be found by respondents, it is evident that the District Judge was justified because if he allowed Steel to bring in an additional expert then he would have had to allow respondents to do likewise and the trial date would have been upset.

Furthermore, it was admitted at the time by counsel for USS that Mr. Holmberg worked with Mr. Quay and his testimony would be cumulative.

Certainly Mr. Holmberg was not a *rebuttal* witness and in view of the trial Judge's minute entry and counsel's violation of same, the District Judge was justified in refusing to allow Holmberg to testify.

IV.—Does The Louisiana Statute Allowing Interest On The Judgment From The Date Of Judicial Demand In An Ex Delicto Matter Before A Jury Violate The Guarantee Of Trial By Jury In A Civil Action Which Is Guaranteed By The Seventh Amendment To The U. S. Constitution.

In answer to petitioner's contention we quote from the majority opinion by the Fifth Circuit at page 2:

> "... In its sixth point of error, U. S. Steel complains that interest on the judgment should not have been allowed from the date of judicial demand pursuant to 13 L.S.A.-R.S. 4203, because an award of prejudgment interest violates the appellant's Seventh Amendment right to a jury trial. There is no merit to this contention. This Circuit has recognized in several cases Louisiana's rule on awarding interest from the date of judicial demand, and has upheld the right to such interest. See, e.g. *Texas Co. v. Lirette*; 5th Cir. 1969, 420 F.2d 1064. Appellant's remaining eight points of error attack various discretionary decisions and evidentiary rulings of the trial judge."

In addition to the above, petitioner did not contend or allege this at the trial of this matter nor did petitioner object when the verdict was rendered or judgment entered by the District Court.

V. The District Court Erred In Refusing To Admit Shell's Complete Report Instead Of Limiting The Offer To The Photographs Thereto Annexed.

It is indeed a fact that the Court refused the admissibility of a report which was described as a preliminary survey, made on behalf of Shell. It should be noted that the Court admonished counsel for United States Steel at page 134 of Volume 4 of the trial proceedings as follows:

> BY THE COURT: "That well may be, Mr. Sarpy, but I do not think you are going to get it to the jury in the form of this report. Bring the people here whose opinions this is supposed to represent and expose them to cross-examination. Then I think you can get it in."
>
> BY MR. SARPY: "May we get Mr. Dominguez back because he was part of the investigation?"

Therefore, in response to counsel for United States Steel's request, Mr. Dominguez then became a witness who testified in Court. We further would like to point out that at page 200 of Volume 4 of the trial proceedings, it is shown that counsel for United States Steel requested two men, a Mr. Hartman and a Mr. Fraser, since these were the two experts, as shown at page 201, who prepared the so-called preliminary examination. Both men testified in response to a request made by United States Steel. The record will reflect that it was on Friday afternoon when the request was made by United States Steel to present these two men to

testify. In obedience to that request, they were brought from Houston, Texas and testified on Monday morning of the trial on behalf of United States Steel. The issue that is raised here on behalf of United States Steel is that the Court would not allow the admissibility of the report. This is strictly a matter of the best evidence rule. The Court allowed the testimony of the men, who stated that their testimony was the best evidence.

To further substantiate the fact that the report was inadmissible, we will look at the testimony of witness Fraser at page 82 of Volume 5 of the trial proceedings, where the witness stated:

> "This was not a committee report. The report was prepared by Roland Dominguez. He consulted with us, with Dr. Hartman and myself, during the preparation of the report and I checked the wording of sections of it. But there was no unanimous committee approval of the report, as such, per se. The opinions, the conclusions were verified with the members of the — Dr. Hartman and myself."

It is interesting to note that while United States Steel is urging that the report should have been admissible, the two men who were principally responsible for making the report, were allowed to testify in their behalf on a moment's notice. We would like to point out that at page 18 of Volume 5 of the trial proceedings, counsel for Hudson objected to the testimony of these two men and that it was not admissible and the Court, on page 18: "Well, I am going to overrule the objection. Drs. Hartman and Fraser may testify."

We would like to point also at page 27 of Volume 3 of the trial proceedings, it was shown through the testimony of Dr. Hartman, that in addition to himself and a Mr. J. P. Fraser, there were also a Mr. J. K. McCarron, T. M. Swanson, a G. H. Holliday, F. P. Dunn and P. W. Marshall, who assisted in the preliminary investigation. Further, the Court will note that at page 27, as referred to, the witness was allowed to testify what his findings were. It is further shown at page 27 that the findings were then related to a Mr. Roland Dominguez, who prepared it in the preliminary report form. It is shown further at page 28 and at the top of page 29 of Volume 5 of the trial proceedings, that the report was written by Mr. R. G. Dominguez.

Therefore, we have a situation where witnesses are testifying about their findings in a preliminary survey and indicating that there were many more people who assisted in these preliminary findings. Further, it was shown that somebody else was the one who actually prepared the preliminary survey in a report form. We submit that the Court was proper in its exclusion of the report as such. Counsel for United States Steel was allowed to put on the witnesses that he requested, as we have shown hereinabove and they were allowed to testify giving their opinion. The objection that is made is that the report, as such, was not allowed in. We submit that clearly, based on the above and foregoing that the best evidence was the testimony of the men themselves, particularly when there were many more assisting in the report and it was compiled and put together in report form by a third person.

CONCLUSION

We submit that this case was tried to a jury, a verdict rendered, and the case appealed to and affirmed by the Fifth Circuit Court of Appeals.

The dissenting Judge admitted that he could find no errors of law but believed the trial Judge had abused his discretion.

The record supports the trial Judge's rulings and the opinion of the Fifth Circuit Court of Appeals.

This writ should be denied.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF TERREBONNE

BEFORE ME, the undersigned authority, personally come and appeared _____, who, after being duly sworn, did depose and say:

That he is one of the attorneys for the applicant in the above and foregoing application and that all of the facts and allegations therein set forth are true and correct to the best of his knowledge, information and belief.

_____

SWORN TO AND SUBSCRIBED
BEFORE ME THIS ____
DAY OF _____, 19__

_____
Notary Public

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30,676

SHIRLEY ROBERTS LAIRD, Individually and for and on behalf of the minors MICHAEL GRAY LAIRD and JOHNNY MARK LAIRD,
Plaintiff-Appellee,

versus

HUDSON ENGINEERING CORPORATION,
Defendant-Appellee,

and

UNITED STATES STEEL CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(September 29, 1971)

Before O'SULLIVAN,* THORNBERRY and INGRAHAM, Circuit Judges.

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*Senior Circuit Judge, 6th Circuit, sitting by designation.

PER CURIAM: In this appeal from a jury verdict below finding the appellant U.S. Steel liable for the wrongful death of plaintiff Laird's husband, U.S. Steel raises some fourteen points of error. The first five points of error attack in one form or another the sufficiency to the evidence to support the jury verdict.

After a review of the Record, we conclude that the evidence was sufficient to support the jury verdict, and satisfies the "sufficiency" standard under which we review jury findings. *Stockton v. Altman*, 5th Cir. 1970, 432 F.2d 946. In its sixth point of error, U.S. Steel complains that interest on the judgment should not have been allowed from the date of judicial demand pursuant to 13 L.S.A.-R.S. 4203, because an award of prejudgment interest violates the appellant's Seventh Amendment right to a jury trial. There is no merit to this contention. This Circuit has recognized in several cases Louisiana's rule on awarding interest from the date of judicial demand, and has upheld the right to such interest. *See, e.g., Texas Co. v. Lirette*, 5th Cir. 1969, 420 F.2d 1064. Appellant's remaining eight points of error attack various discretionary decisions and evidentiary rulings of the trial judge.

We have reviewed each of these contentions and find they all lack merit. Only two of them require comment. U. S. Steel complains of the trial judge's refusal to relax his pre-trial order to allow an additional expert witness to testify for U.S. Steel at the last minute. This was clearly within the trial court's discretion, and we see no abuse of discretion in his refusal to relax the pre-trial order in this instance. Moreover, it appears

that the additional expert's testimony would have been cumulative.

U.S. Steel also complains about the trial court's refusal to grant remittitur as to $238,000.00 in damages awarded the plaintiff for loss of support for herself and her two children. The evidence presented to the jury amply supported this award, and certainly does not warrant any interference by this Court in the trial judge's discretionary decision to deny remittitur. No other point of error as to damages is raised by the appellant.

AFFIRMED.

O'SULLIVAN, Senior U. S. Circuit Judge, dissenting:

I respectfully dissent. I do so because the size of the recovery impelled me to consider whether the trial procedures visited any unfairness upon appellant United States Steel. As set out hereinafter, I am persuaded that such did occur.

Because the majority opinion is silent as to the facts which brought about this lawsuit, I recite those necessary to an exposition of my own views. The amount of $238,000, the figure mentioned in the majority opinion, was awarded for loss of support. Additional amounts allowed for decedent's pain and suffering, for loss of companionship, and for some miscellaneous expenses brought the total recovery to $415,287.85.

Plaintiff's decedent, Malcolm Gray Laird, then 37 years of age, received fatal burns when an explosion occurred in a pipeline located at the premises of Shell Oil Company near Gibson, Louisiana. The catastrophe occurred on December 17, 1968. Malcolm Laird died on December 28, following. He suffered very great pain during the days that intervened. On the date of the explosion, the deceased, a night shift foreman in the employ of Shell, was earning $800 per month. He was survived by his widow and two minor children, Michael Gray Laird and Johnny Mark Laird, aged 13 and 9, respectively.

This lawsuit was started in the United States District Court for the Eastern District of Louisiana on March 6, 1969, naming as defendants United Gas Industries, Inc., United Pipeline Company and Pennzoil United, Inc. The case against these defendants was dismissed when it was disclosed that they had nothing to do with the installation or operation of the pipeline. On May 21, 1969, an amended complaint was filed naming Hudson Engineering Corporation as defendant and charging it with negligence in the design, construction and fabrication of the gas transmission line and its connection with a gas transmission line owned by Shell Oil Company leading into the latter's plant. The explosion occurred at the place of this connection, and it was established that such connection had been made by Hudson Engineering under contract with Shell Oil Company some four or five years before the explosion. The appellant United States Steel was not named or accused of any wrongdoing in the first amended complaint filed some five months after the fatal accident.

On August 26, 1969, another amended complaint was filed — this time adding the United States Steel as a defendant, charging that Steel had manufactured and furnished the 30" pipe that made up the main gas line that led to the "connection." This complaint then charged that U. S. Steel *and* Hudson were negligent because of "improper and faulty design, construction, fabrication and manufacture" of the main pipeline and the "connection." Thereafter, Hudson filed a cross-claim against U. S. Steel, its allegations casting the entire blame for the accident upon Steel.

The stage for this disaster was set in 1964 when, pursuant to a contract with Shell Oil, Hudson Engineering constructed a gas processing plant at the site in question. Supplemental to this original contract, Hudson agreed to extend a 30" gas line to the plant at a depth of five feet below the ground from a flange on a previously installed 30" gas transmission line coming in from the Gulf Tidelands. Another gas transmission line, 12 3/4" in diameter and owned by Shell, would intersect with the 30" line at a point some distance from the plant. The 12" line approached the 30" in a perpendicular direction, three feet above the ground, with a valve several feet from the 30". Hudson connected the 12" into the 30" by using a "Weldolet," a device which required cutting a hole in the 30" pipe and welding this Weldolet to the two lines. Except for the explosion on December 17, 1968, there was no evidence of any difficulty with the performance of the 30" pipe which had been furnished by U. S. Steel. It continues in use at the Shell Oil plant.

The case came on for trial to a jury on June 8, 1970, Hudson charging that the inferior quality of the 30" pipe which had been furnished by Steel was the sole cause of the explosion, and Steel charging that carelessness of Hudson in designing and making the connection was the cause of it. Resolution of the issue of proximate and responsible fault became primarily a contest of experts hired by the antagonists, although Steel produced some of its own people. Hudson produced none of its people who had designed and carried on the work of making the involved connection. Its vice-president, one Battershell, who had been Hudson's project engineeer on the job — listed in a pretrial order as a witness it would produce at trial — had gone to Australia at the time of trial and Hudson was allowed to provide a substitute for him. The witness, however, was not called by Hudson but by plaintiffs, whose counsel enjoyed the advantage of cross-examining him as an adverse witness. As discussed later, Steel charges error in this allowed change of witnesses. None of the persons listed at pretrial as those employees of Hudson who had made the installation where the explosion occurred was produced. Shell Oil Company was allowed to intervene as a party plaintiff to seek recovery for the cost of fulfilling its Workmen's Compensation obligations to the widow of the decedent. It charged that the death of its employee resulted from negligence of Hudson Engineering and U. S. Steel. The evidence showed that promptly after the explosion, with the consequent death of its employee and damage to its plant, Shell began an investigation of the scene of the explosion. It used men from its engineering staff, some of whom qualified as experts in the relevant field. The

investigating team totalled some six men. They made a written report of their findings which was ambivalent as to fixing the blame for the casualty. This staff-written report contained the following conclusions:

> "Preliminary conclusions based on visual inspection of the ruptured pipe are that the rupture originated from a brittle crack in the base metal of the 30-inch pipe at the toe of the weld attaching the 30 x 12 Weld-O-Let to the pipe. It appears that the brittle crack was formed some time prior to the failure and resulted from residual stresses developed during the fabrication or from the combination of these residual stresses and subsequent mechanical damage. It is further concluded that damage to the existing plant would have been lessened by different design of certin plant components."

It will be noted that this conclusion did not fix the total blame upon the U. S. Steel pipe, nor forecast the opinions that would be expressed by the experts hired by plaintiffs and Hudson.

None of these Shell investigators, however, was produced by the plaintiffs, by Shell, or by Hudson. The defendant called some of these men, but was denied the opportuntiy to cross-examine them or use the above report in such examination — this notwithstanding that their employer, Shell Oil, had become a party adverse to U. S. Steel. Their trial testimony can be read as, in some measure, downgrading their first expressed

views as being only "preliminary," Hudson Engineering was not employed to make the repairs required by the explosion.

At trial, plaintiffs Hudson Engineering and Shell Oil were aligned in casting blame on Steel. Plaintiffs called as a witness for cross-examination Hudson's named expert who found agreement with plaintiffs' expert in assigning the cause of the explosion to inferior quality of the pipe furnished by Steel. Plaintiffs' proofs were so acceptable to Hudson and Shell that the latter rested their cases at the close of plaintiffs' proofs. By direction of a pretrial order, the jury was required first to determine liability. It exonerated Hudson. It was then directed to assess plaintiffs' damages against U.S. Steel only.

The judgment entered, $415,287.85, comprised the jury's award to the widow and minor children of plaintiffs' decedent of $238,000 for loss of support, $100,000 for pain and suffering of the deceased during the eleven days that he survived his fatal burns, $70,000 for loss of companionship of the deceased husband and father, and $7,287.85 for medical and funeral expenses. To the figure of $415,287.85 there was added interest at 5% from August 26, 1969, the date when appellant United States Steel was added as a party defendant to the suit. If we may assume that it will take to August 26, 1971, to bring this matter to finality, there will be added to the judgment $41,528.78 for interest, making a total amount to satisfy the judgment of $456,816.63. The deceased's earnings at the time of death were $9,600 per year. If the amount to be paid in satisfaction

of the judgment were invested at a yield of 5% per annum, such investment would yield a yearly income of approximately $23,000 for the remaining life of the plaintiff widow, or for whatever period the sum remained invested, and at the end of such period the entire principal sum would still be intact.[1]

Plaintiffs' proofs included testimony by an actuary who calculated that the earnings of the deceased, had he lived out his total work life expectancy of 26.8 years, would have totalled $353,148. We assume that the reduction to $238,000 portrays the jury's reduction of the actuary's figure upon taking into account the cost of deceased's own support, and their assumption that he would have devoted substantially two-thirds of his income to his wife and two children. Such calculation would permit a recover of about $235,000. This was what plaintiffs' attorney suggested in his closing argument.

In order to come up with his total, plaintiffs' actuary assumed that the deceased's earnings would have increased at the rate of 6% per year, from a $12,000 salary which plaintiffs' testimony averred the deceased would have been earning at the end of three years following the date of his death. This, of course, was an arbitrary assumption. It assumes that in the 26th year of the deceased's expectancy he would be

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[1] I am aware that reductions must be made for attorney fees and for what will be due to Shell Oil Co., the deceased's employer, for whatever amount it will have paid, up to August 26, 1971, on account of its liability under the applicable Workmen's Compensation Law.

earning about $40,000 per year — contributing two-thirds of it to his wife and children, or to the widow alone after his children had reached their majority. The actuary's calculations were based upon the deceased's present and future earnings in gross, without any factor for the impact of income tax. Thus, his figure was constructed upon an assumption that the deceased would not have had to pay tax upon his ever-increasing income. This is, of course, a distortion.

Just before the jury was to retire, the following colloquy occurred:

> "By Mrs. Gabb [a juror]: May I ask a question? You just said that we should not consider attorneys' fees or costs of court or interest. What about Federal tax on this amount awarded here? Is that taxable?
>
> "By the Court: You are not to consider this. You will make your determination but without regard to *the tax* on the amount that you may award. (Emphasis supplied.)
>
> "By Mr. Sarpy: But there is the income tax on the earnings.
>
> "By the Court: Well, the income tax that Mr. Sarpy referred to was the tax on the possible earnings of Mr. Laird, and the contention that taxes would be withheld on his earnings would affect the amount that would be available for his own support, as well as for the support that

he would contribute, or might be expected to contribute, to his wife and children.

"By Mr. Sarpy: Judge, I think the question of tax on the award itself, the Court mentioned that there would be no tax on that.

"By the Court: I did not mention that at all. I said the jury was not to consider that.

"By Mr. Sarpy: Not to consider it?

"By the Court: Whether there was or was not."

I am aware that this Circuit has held that the trial judge is not required to tell the jury that an award of damages in a death or personal injury case is not subject to income tax. *Cunningham v. Bay Drilling Co.*, 421 F.2d 1398 (5th Cir. 1970); *Prudential Ins. Co. v. Wilkerson*, 327 F.2d 997 (5th Cir. 1964). Such also is the rule in the Sixth Circuit case, *Payne v. Baltimore & Ohio R.R.*, 309 F.2d 546, 550 (6th Cir. 1962), *cert. denied*, 374 U.S. 847. The writer dissented on this point, saying:

"Our contemporary public mind is well conditioned to the belief that, today, there is almost nothing of money value which anyone receives that is not shared in substantial degree with the national government. As pointed out by Chief Judge Lumbard in his dissent in McWeeney v. N.Y.N.H. & H.R. Co., 282 F.2d 34, 41 (C.A. 2, 1960), the public today reads of

> the rather spectacular share that the government takes of large sums 'won on television quiz programs or in lotteries and sweepstakes.' The public is informed of the amount that is taken in income taxes from large salaries paid to business executives, stars of the entertainment world and other large earners, and the amounts that are taken in taxes from decedents' estates. Have we any assurance that today's juries, awarding verdicts in the range of the one before us, $136,267.23, are aware that, unlike almost any other receipt of money, they are tax free? I would venture a guess that a substantial number of lawyers (excluding those engaged in the personal injury business) would be unsure of the tax consequences of receiving a $100,000.00 personal injury verdict. Should we expect jurors to be better informed?" 309 F.2d at 552-53.

I am satisfied that soon the involved rule will be changed to require some recognition of the patent unfairness of refusing any help to juries who will be unsure of their own responsibilities in arriving at verdicts. See *Domeracki v. Humble Oil & Refining Co.*, ___ F.2d ___ (3rd Cir. 1971), 39 U.S.L. Week 2659, and also Chief Judge Lumbard's dissent in *McWeeney v. New York, N.H. & H.R.R.*, 282 F.2d 34, 41 (2d Cir. 1960); and my dissent in *Payne v. Baltimore & Ohio R.R., supra*, 309 F.2d 546, 550 (6th Cir. 1962).

What happened in the case at bar provides, in my view, sound reason for not applying the rule of the

cases which merely refused to find reversible error in denying a request upon the point. In this case, defendants' counsel had, in his argument, said to the jury that the calculation of deceased's earnings had he lived had not taken into account the income taxes that would have had to be paid, and then told the jury, "any amount that you give him will be free from income taxes." Quite obviously, counsel's statement did not satisfy all the jury on the point. I have set out above what the judge told the jury upon inquiry by one of them. At this distance, it would be quite difficult to be sure whether or not the judge's twice mentioning the subject:

> "You will make your determination but without regard to *the tax on the amount* that you may award."

and,

> "I did not mention that at all. I said the jury was not to consider that."

was not, in effect, telling the jury that defendants' counsel had misinformed them when he said that their award would not be subject to tax. Out of all of this, I feel this jury could indeed have the impression, or at least be unsure, but that plaintiff would have to pay income tax on whatever verdict they gave. I observe that just before the quoted colloquy about income tax, the judge had said to the jury:

> "In further considering the amount Malcolm Laird might have earned or the amount he would have contributed to the support of his surviving wife and children, you may consider the probabilities of inflation, depression, or a stable economy. In so doing, you may consider such things as increases and decreases in the cost of living and the wage-price ratio as your own common knowledge and experience may dictate.
>
> "Similarly, in awarding damages, if any, you may consider *the decreased purchasing power of the dollar.*" (Emphasis supplied.)

Having been told these things, clearly calculated to enhance their award of damages, can it be considered fair to have left them with the impression or the passive fear that a large amount of their verdict would be taken for income tax?

Why should we not have the sophistication and courage to baldly recognize that no such verdict would likely have been entered here except for the circumstance that the United States Steel Corporation is the defendant? In a day of much talk about equal protection of the law, should not the courts carefully consider whether a particular verdict came about from the apparent ability of the involved defendant to pay, rather than from a fair measuring of liability and damages?

My brothers, however, do not consider the verdict excessive. Its size, however, and my impressions of

some of the trial procedures set out above and hereinafter, urge me to consider whether trial errors contributory to the size of the verdict call for a new trial. See *Home Ins. Co. v. Tydal Co.*, 152 F.2d 309, 311 (5th Cir. 1945); *Sinclair Refining Co. v. Tompkins*, 117 F.2d 596, 597 (5th Cir. 1941). I am of the view that the trial judge committed reversible error in refusing defendant's request to use an expert rebuttal witness because his name was not disclosed in the initial pretrial exchange of names of expert witnesses to be used at the trial. If denial of use of such rebuttal witness would ordinarily be an exercise of discretion by a trial judge, I would, in the total context of the trial involved, hold that the trial judge abused his discretion.

In the majority opinion, my brothers dispose of the trial court's refusal to allow appellant to call a named rebuttal witness as follows:

> "U.S. Steel complains of the trial judge's refusal to relax his pre-trial order to allow an additional expert witness to testify for U. S. Steel *at the last minute*. This was clearly within the trial court's discretion and we see no abuse of discretion in his refusal *to relax the pre-trial order* in this instance. Moreover, it appears that the additional expert's testimony *would have been cumulative*." (Emphasis supplied.)

With great respect, may I observe that appellant's request to call this rebuttal witness did not come *at the last minute*. Neither would it have been contrary

to the pretrial order to have allowed this rebuttal witness to testify, and we have no way of knowing whether this witness' testimony *"would have been cumulative."* The trial of the case had been set for June 8, 1970. On May 8, 1970, 30 days prior to the trial date, U. S. Steel's counsel filed a notice that one M. E. Holmberg might be called as an expert witness. Notice of this was given to all counsel of record on the day it was filed. On June 3, 1970, plaintiff filed its opposition to appellant's calling such witness, averring that it would be unfair to allow U. S. Steel "to surprise the other parties with a witness who has not been deposed * * *." On June 3, 1970, the trial judge entered an order denying Steel the right to call the named witness, recognized as a rebuttal witness. The pretrial order of January 6, 1970, referred to above contained the following:

> "In the event there are other witnesses to be called, at the trial, *at least ten (10) days prior,* the names, addresses and the general subject matter of their testimony will be reported to opposing counsel, and a supplemental note of evidence will be filed into the record of the case, but that *this restriction shall not apply to rebuttal witnesses,* the necessity of whose testimony cannot reasonably be anticipated before the time of trial." (Emphasis supplied.)

The plaintiff had ample time between May 8, 1970, and the fixed trial date in which to take a discovery of the witness that defendant proposed to call. It would appear, therefore, that U. S. Steel's notice of its inten-

tion to call M. E. Holmberg as a rebuttal witness was not *at the last minute* and the proposal to do so *was not at odds with the pretrial order*. It was given more than ten days prior to trial, and the relevant pretrial order specifically said that it "did not apply to rebuttal witnesses."

Rule 16, Fed. R.Civ.P. covering pretrial procedure provides for a conference to consider "The limitation of the number of expert witnesses." The order before us did not attempt to set the number of experts to be used by either side. Although this writer has heard that some District Judges, devotees of the asserted virtues of elaborate pretrial, require counsel to give advance notice of the names of rebuttal witnesses, I question the power of a trial judge to do so. Any lawyer worth his salt should refuse to commit himself in advance as to what witness, or witnesses, he might need for rebuttal. How can he do this until he has heard his adversary's proofs at trial? Discovery depositions are helpful, but witnesses, especially experts, do not always stick to the text of discovery depositions.

In contrast to his refusal to allow U. S. Steel to call a theretofore unnamed rebuttal witness, the trial judge allowed defendant Hudson Engineering to substitute a new name for one that they had listed as a so-called "will call' witness. Defendant Hudson Engineering, who had aligned itself with plaintiffs' effort to case blame for the tragic accident upon Steel, thus to exonerate itself, had given the name of its vice-president, Battershell, as a witness it would call. He was identified as the project engineer for Hudson Engineering

on the connection work whereby it cut the hole in the pipe alleged to have been furnished by U. S. Steel. A new witness was to be substituted for Battershell because it was urged that Battershell had to be in Australia at the time scheduled for commencement of the trial on June 8. Request to substitute one Darnielle for Battershell was not made until June 5, the Friday before commencement of trial on the following Monday.

Hudson's brief to this Court offers an explanation of its failure to produce its one employee — a vice-president — who would have known the most about how the work of cutting into the pipe furnished by U.S. Steel and making the so-called connection at the site of the explosion had been carried on. The explanation is that sometime shortly prior to June 1, 1970, it was thought that the trial would not go ahead on June 8, 1970, the date originally set. However, on June 1, 1970, at a pretrial conference, June 8 was reinstated as the trial date. The brief asserts that Hudson's counsel then said there was a *possibility* that Battershell would have to go to Australia and "that this trip could not be postponed." No attempt has been made to tell why Battershell's trip to Australia "could not be postponed." My reading of this explanation is that Battershell was still in the United States when the original trial date of June 8, 1970, was reinstated on June 1, 1970. He apparently left on the eve of the trial. With Battershell lately gone to Australia, and no others of Hudson's people who had actually worked on installation of the so-called "connection" produced, Steel was deprived of the opportunity to make pertinent inquiry

of the men who had done the work as to just how such "connection" had been made. Interrogatories which U. S. Steel had directed to Hudson asked:

> "13. Give the names and addresses of the foreman and all of your employees and representatives who worked on the original installation of the 30" line in question at the North Terrebonne Plant of the Shell Oil Company."
>
> * * * *
>
> "16. Identify the persons who performed the welding operations on the Weldolet unit, or were witnesses thereto, including the welding foreman, superintendent and each welder."

Hudson's answers to the foregoing were:

> "13. The following are the personnel, known by Hudson, who worked on the tie-in at the 12" and 30" lines:
>
> Project Engineer: David D. Battershell, 657 Strey Lane, Houston, Texas. [The man who went to Australia]
> Superintendent: Ray Hodges, P.O. Box 460, Falfurrias, Texas.
> Welding Supervisor: Roy Roberts, c/o Hudson Engineering, 5900 Hillcroft, Houston, Texas.
> Testing Supervisor: Frank Brasher, P.O. Box 908, Clute, Texas."
>
> * * * *

"16. Ray Hodges, Superintendent.
Roy Roberts, Welding Supervisor.
Warren Newman, welder.
Earl Lishman, Jr., welder.
A. J. LeBlanc, welder.
John Kristicevich, welder."

These answers show that Edward Darnielle, the witness substituted for Hudson's "boss man" on the involved job — Project Engineer David D. Battershell — was not mentioned as having anything to do with, or knowing anything about, the job in question. Not one of the persons named in Hudson's above answers were produced at the trial.

Thus, it will be seen that Hudson Engineering who made the involved installation and Shell Oil who promptly investigated the cause of the explosion, both did a rather spectacular job of "hiding out" with their own knowledgeable people. U. S. Steel proffered an instruction which would have told the jury,

> "You are instructed that the failure of Hudson to produce witnesses to testify concerning the design of the Weldolet joinder of the 12 and the 30 without explaining such failure gives rise to the presumption that such witnesses, if produced, would give testimony adverse to the position of Hudson."

The District Judge refused to give it.

The relevant gvneral rule is stated in C.J.S. as follows:

> "It is discretionary with the court whether to give an instruction as to the failure of a party to produce evidence within his control, and a failure to do so is not necessarily error, *although under the circumstances of the case it may be,* * * *." 88 C.J.S. Trial § 312, p. 830.

I would not hold that, standing alone, the denial was reversible error or an abuse of discretion. I ponder, however, as to whether, in the total context, fairness would have been served by such an instruction. The failure to give it adds to my concern as to whether the procedure employed detracted from Steel having a fair trial. With some reluctance, I am constrained to say that, however unwittingly, the trial judge did not exercise his discretion with desirable detachment.

Because of impressions gained from my review of the trial, I am led to the opinion that the District Judge's refusal to allow Steel to use its proposed rebuttal witness visited substantial disadvantage upon it. There is no way, at this distance, to determine what may have been the probative worth or the jury's appraisal of the testimony that might have been given by Steel's proposed rebuttal witness. I consider that the trial judge's ruling was error — that it was not within his power to deny Steel's request; if his ruling was an exercise of discretion, I would hold that it was an abuse of such discretion.

I would reverse and remand the cause to the District Court for a new trial.

APPENDIX B

Minute Entry
January 6, 1970
BOYLE, J.

SHIRLEY ROBERTS LAIRD, ETC.
versus
No. 69-478
Civil Action
Section D
HARTFORD ACCIDENT AND INDEMNITY COMPANY, ET AL

A pre-trial conference was held this day.

PRESENT:
Joseph L. Waitz, Esq.
Michael X. St. Martin, Esq.
For Plaintiff

Leon Sarpy, Esq.
Paul A. Nalty, Esq.
For United States Steel Corporation

Philip J. McMahon, Esq.
Edmund McCollam, Esq.
For Hudson Engineering Corporation

1. Trial, with jury, is set for June 8, 1970, at 10:00 A.M.

2. (a) Not later than February 20, 1970, counsel for plaintiff and defendant, United States Steel Corporation, shall exchange with each other, and shall furnish to counsel for defendant, Hudson Engineering

Corporation, copies of reports and opinions of experts to be called as witnesses by each.

(b) Within 20 days after receipt by counsel for defendant, Hudson Engineering Corporation, from counsel for plaintiff and defendant, United States Steel Corporation, of the aforesaid reports and opinions, and in any event not later than 20 days after February 20, 1970, counsel for Hudson Engineering Corporation shall furnish to counsel for plaintiff and United States Steel Corporation copies of reports and opinions of experts to be called as witnesses by Hudson Engineering Corporation.

3. (a) All depositions for use on trial shall be taken and all discovery shall be completed not later than April 1, 1970.

(b) The scope of examination of experts in discovery depositions shall include the opinions and conclusions of said experts.

4. Not less than 10 days prior to May 2__, 1970 counsel for the parties shall meet and confer for the following purposes:

(a) Determination of all facts not in dispute;

(b) Exchanging and numbering of exhibits intended to be offered on trial;

(c) Determination of which exhibits and other evidence will or will not be objected to; and

(d) For preparation of the exhibit list referred to in paragraph 5 below.

5. Not later than May 29, 1970 there shall be submitted to the Court:

(a) A list of pre-numbered exhibits, together with a brief identifying description following each listed exhibit, intended to be offered on trial and as to which no objections to admissibility are to be mde. The list shall be prefaced by or concluded with a stipulation of admissibility. An order to be rendered by the Court pre-trial admitting said exhibits in evidence shall also be submitted.

(b) A list of pre-numbered and described exhibits intended to be offered on trial as to which objections are to be made.

(c) Memoranda in support of admissibility of the exhibits referred to in subparagraph (b) above and objections thereto.

(d) Memoranda relating to other evidence intended to be offered as to which objections will be made, which shall set forth the evidence intended to be offered and authorities in support of admissibility and objections thereto.

(e) Amended pre-trial order setting forth all undisputed facts.

(f) Memorandum on all controverted questions of law.

(g) Requests for special jury charges, with citation of supporting authorities.

(h) Suggested voir dire questions.

(i) Suggested special verdict interrogatories on all jury issues.

(j) Succinct statements of all issues and contentions to be urged by each party. (The Court proposes to incorporate these statements in its charge to the jury.)

6. The defendants shall exercise peremptory challenges (three) jointly.

7. The jury questions shall be submitted to the jury under applicable instructions and on special verdict interrogatories in the following order:

(a) Main demand liability

(b) Cross claims liability

(c) Main demand quantum.

8. A further pre-trial conference shall be held on June 1, 1970 at 4:00 P.M., at which, in addition to other matters, all questions of admissibility of evidence, if any, which may be disposed of pre-trial, shall be heard and disposed of.

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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-894

UNITED STATES STEEL CORPORATION,
Petitioner

versus

SHIRLEY ROBERTS LAIRD, Individually and for and on behalf of the minors MICHAEL GARY LAIRD and JOHNNY MARK LAIRD,

and

HUDSON ENGINEERING CORPORATION,
Respondents

REPLY TO OPPOSITION BY MRS. SHIRLEY ROBERTS LAIRD, Individually and for and on behalf of the minors MICHAEL GRAY LAIRD and JOHNNY MARK LAIRD

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PAUL A. NALTY
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MAY IT PLEASE THE COURT:

The respondent seeks to rebut the factual findings of Judge O'Sullivan by referring to Hudson's brief in the Circuit Court and to isolated parts of the record below.

neither of which is a part of the record before this Court. Respondent had the privilege under Rule 21-1 of the rules of this Court to get the record or any portion of it certified to the Supreme Court. Respondent has not chosen to do so and hence is in no position to attack the correctness of the findings of Judge O'Sullivan, particularly in the absence of any contrary findings by the majority. The findings of Judge O'Sullivan are the only judicial pronouncement which sets forth the salient facts. The attacks by the respondent against Judge O'Sullivan's dissenting opinion only serve to highlight the correctness and the importance of his carefully worded findings. Respondent's contention that Judge O'Sullivan's opinion does not contain errors of law but "merely an abuse of discretion" on the part of the District Judge is sheer sophistry. An abuse of discretion is an error of law.

Respondent seeks to imply, p. 2, that we avoided the majority opinion. The complete opinion having been carried at p. 45 of the petition, including the majority opinion, the implication is false.

I. INCOME TAXES

The respondent does not question the existence of a conflict between the circuits on the effect of income taxes against the award and against the effect on loss of earnings.

Respondent's opposition only served to confirm and highlight the confusion which confronted the jury by the comments made by the judge during the trial concerning income taxes.

Respondent pleads at p. 9 of her opposition that if the

Supreme Court should reverse the Court of Appeals, the rule should be prospective, citing no authority. It is fundamental that the final decision reverts to the time of filing suit so that only this particular case is affected.

The disparity between the circuits and the inequities which are thereby created are squarely before this Court and should be resolved so as to make the law uniform and predictable for future cases.

II. UNEXPLAINED FAILURE TO PRODUCE WITNESS

The presumption against Hudson for failure to produce its own important witness is one which Hudson should explain away. No argument by respondent can erase the glaring failure of Hudson to appear before this Court to explain away such failure on its part to produce its important witnesses.

Respondent seeks to champion the position of Hudson when Hudson so far has not even seen fit to favor this Court with an opposition.

This point is of no concern of respondent and her citing from Hudson's brief in the Court of Appeals, which is not even before this Court, is most incongruous and only bears out even more glaringly Judge O'Sullivan's conclusion that the plaintiff and Hudson worked closely together.

No authorities are cited in support of her contentions.

III. DISCRIMINATION

Respondent again criticizes Judge O'Sullivan's findings in the dissent which are the only findings set forth in the

Fifth Circuit's opinions. Judge O'Sullivan's opinion is well buttressed with appropriate conclusions and in the absence of dispute over these facts by the majority, the dissent stands as unassailed and necessarily stands as correct before this Court.

Respondent's statement that Judge O'Sullivan's dissent incorrectly refers to Holmberg as a rebuttal witness is begging the question, because Holmberg was offered in rebuttal, as Judge O'Sullivan found.

If respondent sincerely felt that the dissenting opinion incorrectly sets forth the facts, the respondent should have asked that the record be certified, in whole or in part, so as to indicate in a proper manner in what respects the dissenting opinion was incorrect.

IV. INTEREST AND THE CONSTITUTIONAL QUESTION

The half page rebuttal is bereft of any citation of authorities other than the majority opinion of the Fifth Circuit which cites no legal authorities for the decision other than *Texaco, Inc. v. Lirette*, 410 Fed.2d 1064 (1969). *Texaco* merely states that in diversity cases the state law governs the award of interest. Neither in *Texaco* nor in any other case which has been considered, has the constitutionality of such state statute been at issue.

There is no rebuttal to the wealth of authorities to this important constitutional question which the Court of Appeals decided adversely to us and which was submitted in our brief to the Court of Appeals and upon which question this Court has not ruled.

The question is therefore properly before this Court.

V. SHELL'S REPORT

Here again the respondent cites no authorities.

Further and more importantly, Shell's report should have been allowed into evidence because it was properly identified by the witnesses who were responsible for it, and who made it at a time when no legal proceedings were contemplated and when Shell's employees were not suspicious of litigation.

Here again, to rebut Judge O'Sullivan's findings respondent has restored to two isolated portions of the record. Judge O'Sullivan's findings are the only ones on the subject and were not attacked by the majority and therefore should not be questioned by this Court.

Since respondent has not chosen to certify any part of the record, her quotations are entirely out of order.

This argument on the Shell report is improper because it pertains only to Hudson's objection and only Hudson has a right to reply. Respondent did not object at trial and has no right to be concerned with this issue at this time. Hudson, as previously stated, has thus far remained silent on this important question which materially affects Hudson's position in the case.

The Shell report should have been considered in toto by the jury.

CONCLUSION

The dissent of Judge O'Sullivan pertinently sets forth the major contentions, which we have submitted in our

petition for certiorari. The respondent has not and, we submit, cannot seriously dispute these points.

It is indeed strange that Hudson has not seen fit to champion its own cause and that this is taken up by the respondent. This leads one to believe that respondent and Hudson did work together to the detriment of your petitioner. This was declared to exist by Judge O'Sullivan and there is no denial of this by either respondent or the silent Hudson.

For the reasons stated in our original petition for writ of certiorari and for the reasons set forth by the dissenting Judge in the Fifth Circuit decision we respectfully request that this writ should be granted to petitioner.

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J. DWIGHT LeBLANC, JR.
Attorneys for Petitioner
1500 National Bank of
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New Orleans, La. 70112

OF COUNSEL
CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

CERTIFICATE

I, Leon Sarpy, a member of the Bar of this Court, do hereby certify that I have this day served copies of the above and foregoing application to Mr. Joseph L. Waitz, attorney for Shirley Roberts Laird, et al., and to Mr. Philip McMahon, attorney for Hudson Engineering Corporation, by mailing them, postage prepaid, to the said attorneys at their offices, at Houma, Louisiana, on this 22nd day of February, 1972.

ORIGINAL SIGNED
LEON SARPY